TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 216.

SOUTHEASTERN EXPRESS COMPANY, APPELLANT,

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC.; W. J. MILLER, STATE AUDITOR, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED FEBRUARY 18, 1924.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922

No. 802

SOUTHEASTERN EXPRESS COMPANY, Appellant,

vs.

STOKES V. ROBERTSON, State Revenue Agent of State of Mississippi, et al., Appellees.

Appeal to the Supreme Court of the United States from the District Court of the United States for the Southern District of Mississippi.

MOTION OF APPELLANT FOR PERMISSION TO USE RECORD ON FORMER APPEAL OF THIS CASE AS RECORD UPON THIS APPEAL

Appellant, Southeastern Express Company, Respectfully shows to the Court and moves it as follows:

Southeastern Express Company filed its original Bill of Complaint in the United States District Court for the Southern District of Mississippi against the appellees, officers of the State of Mississippi, to enjoin them from enforcing a privilege tax sought to be exacted of it, under certain laws of the State of Mississippi, upon the ground of the unconstitutionality of the Statutes under authority of which said appellees were endeavoring to collect said tax.

Conformably with the provisions of Section 266 of the Judicial Code, appellant's application for interlocutory injunction was duly heard by Circuit Judge Nathan P. Bryan, District Judge E. R. Holmes and District Judge H. D. Clayton; the said Circuit Judge Bryan and District Judge Clayton having been called to his assistance by the Honorable E. R. Holmes, Judge of the United States District Court for the Southern District of Mississippi. Subsequent to the hearing in question, the Honorable E. R. Holmes, District Judge, on the 1st day of July, 1922, entered an order denying appellant's said application for interlocutory injunction, he having allowed in said order an appeal to this Honorable Court and having also allowed a stay in order to preserve the status quo continuing in effect the temporary restraining order previously granted, restraining appellees from collecting said privilege tax until the termination of the appeal.

The appellant having perfected its appeal from said order, made and entered by Honorable E. R. Holmes, District Judge, on July 1st 1922, duly filed a transcript of the record of the proceedings had in the lower Court in this Court and had said record printed, the same being docketed in this Court as No. 528, October Term, 1922.

After the decision of this Honorable Court in the case of Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission, et al., — Supreme Court Reports, page —; 43 Supreme Court Reporter, 75 (decided November 20th 1922), appellant conceived that said order made and entered by District Judge Holmes on July 1st 1922, not having been signed by Honorable Nathan P. Bryan, Circuit Judge, and Honorable H. D. Clayton, District Judge, was void and that the supersedeas and stay granted in said order was also void, and petitioned said three Judge Court, in view of the decision of the Supreme Court of the United States in the case above cited, for an order passing upon its application for interlocutory injunction, and in connection therewith for an order allowing it an appeal as well as for an order allowing it supersedeas and stay maintaining the status quo, and restoring, continuing and extending the restraining order originally granted pending an appeal.

On the 1st day of December, 1922, the Honorable Nathan P. Bryan, Circuit Judge, Honorable H. D. Clayton, District Judge, and Honorable E. R. Holmes, District Judge, all signed and had entered an order denying the application for interlocutory injunction, at the same time allowing this appeal and preserving the status quo by keeping in effect the temporary restraining order originally granted pending the termination of the appeal. Appellant perfected an appeal from the order of the said three Judges, made and entered on December 1st 1922, and has had such second appeal docketed in this Court, having filed herein a transcript of the record of the proceedings in the lower Court, with the exception of such parts of the record as were filed herein upon the first appeal.

Appellant and appellees, for the purpose of saving unnecessary expense, have entered into a stipulation to the end that so much of the record as on the first appeal may be pertinent and appropriate may be made the record upon this appeal and used in connection herewith. The stipulation in question, which is submitted with this motion to the Court, also provides that the appellant may, without notice to the appellees, make motion to this Court for the approval of said stipulation and for an order carrying out the purposes of the same.

Wherefore, appellant prays an order of this Court:

First. Approving the stipulation made and entered into between the parties and presented to the Court as a part of this motion; and

Second. Making the record on first appeal now in this Court, the same being No. 528, October Term, 1922, the record on this appeal insofar as the same may be pertinent, applicable and appropriate.

Sanders McDaniel, A. S. Bozeman, H. L. Greene, J. Blanc Monroe, Solicitors for Southeastern Express Company.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1922.

No. 802

SOUTHEASTERN EXPRESS COMPANY, Appellant,
vs.
STOKES V. ROBERTSON, State Revenue Agent of State of Mississippi, et al., Appellees.

Appeal to the Supreme Court of the United States from the District Court of the United States for the Southern District of Mississippi.

The application made by Southeastern Express Company, Appellant, in its original Bill of Complaint filed in the United States District Court for the Southern District of Mississippi for interlocutory injunction restraining the Appellees, as officers of the State of Mississippi, from enforcing against Appellant a privilege tax sought to be exacted under certain laws of the State of Mississippi, upon the ground of the unconstitutionality of the statutes under which such privilege tax was sought to be exacted, having been, pursuant to Section 266 of the Judicial Code and according to the practice prescribed thereby, heard by Circuit Judge Nathan P. Bryan, District Judge E. R. Holmes and District Judge H. D. Clayton, said Honorable Nathan P. Bryan and Honorable H. D. Clayton having been called to his assistance by the Honorable E. R. Holmes, Judge of the United States District Court for the Southern District of Mississippi; and subsequent to the hearing in question the Honorable E. R. Holmes, District Judge, having on the 1st day of July, 1922, entered an order denying Appellant's said application for interlocutory injunction, he having also in said order (after reciting therein that petition for an appeal to the Supreme Court of the United States had been made by Southeastern Express Company from the order denying its said application for interlocutory injunction) continued in effect the restraining order previously granted, further reciting in said order that a requirement for an additional bond as a condition to the stay had been complied with by Southeastern Express Company, and ordering that the appeal should operate as a supersedeas and suspend until the final determination of said appeal the rights of defendants and Appellees to enforce against Appellant the statutes in question, and that the temporary restraining order previously granted be restored and extended, to remain in full force and effect until the determination of the appeal:

And, whereas, Southeastern Express Company perfected its appeal from said order of July 1st, 1922, made by Honorable E. R. Holmes, District Judge, filed a transcript of the record in the Supreme Court of the United States and had said record printed, said appeal being docketed in said Appellate Court as No. 528, October Term, 1922;

And, whereas, after decision was rendered by the Supreme Court of the United States in case of Cumberland Telephone & Telegraph Company vs. Louisiana Public Service Commission, et al., — Supreme Court Reports —; 43 Supreme Court Reporter, 75 (decided

November 20th, 1922), Southeastern Express Company, Appellant, conceived that the order above referred to of July 1st, 1922, having been signed and entered solely by Honorable E. R. Holmes, District Judge, and not having been signed by the Honorable Nathan P. Bryan, Circuit Judge, and Honorable H. D. Clayton, District Judge, who, as above stated, were called to Judge Holmes' assistance and who sat with him upon the hearing of the application for interlocutory injunction, was void and that the supersedeas and stay granted in said order was also void, petitioned said three Judge Court, in view of the decision of the Supreme Court of the United States above cited, for an order passing upon its application for interlocutory injunction, and in connection therewith for an order allowing it an appeal as well as an order allowing it supersedeas and stay maintaining the status quo and restoring, continuing and extending the restraining order theretofore issued pending appeal;

And, whereas, on the 1st day of December, 1922, the Honorable Nathan P. Bryan, United States Circuit Judge, Honorable H. D. Clayton, United States District Judge and Honorable E. R. Holmes, United States District Judge all signed and had entered an order denying the application for interlocutory injunction, at the same time allowing an appeal and preserving the status quo by keeping in effect the temporary restraining order theretofore granted pending the determination of the appeal;

And, whereas, appeal was thus perfected to the Supreme Court of the United States by the Southeastern Express Company from the order of said three Judges of December 1st, 1922. Inasmuch as the transcript of the record upon the appeal taken from the order of Honorable E. R. Holmes of July 1st, 1922, is now on file in the Supreme Court of the United States, the same having been printed; in order that undue and unnecessary expense may be avoided;

It is hereby stipulated and agreed by *the* between Appellant and Appellees that the record in the Supreme Court of the United States in the first appeal, docketed as No. 528, October Term, 1922, may be used and become a part of the record in said Supreme Court of the United States, to the extent to which it is appropriate and pertinent, upon the second appeal taken from the order of said three Judges denying the application for interlocutory injunction on December 1st, 1922.

And Appellees expressly agree and stipulate that Appellant, Southeastern Express Company, may present a motion to the Supreme Court of the United States for the approval of this stipulation and for an order making the record on the first appeal a part of the record on the second appeal without notice to Appellees and that said Court may enter an order on such motion without notice to Appellees.

Sanders McDaniel, H. L. Greene, J. Blanc Monroe, Bozeman & Cameron, Attorneys for Southeastern Express Company, Appellant. Alexander & Alexander, Attorneys for Stokes V. Robertson, State Revenue Agent, etc., and W. J. Miller, State Auditor, etc., Appellees. Jany. 1, 1923.

[File endorsement omitted.]
[File endorsement omitted.]

1 In the District Court of the United States for the Southern District of Mississippi.

Caption.

Pleas and proceedings had and done before the District Court of the United States begun and held in the city of Biloxi, Mississippi, on the 24th day of June, 1922, that being the time designated by special order of court for holding said court.

Present and presiding the Hon. Edwin R. Holmes, United States District Judge, Hon. N. P. Bryan, United States Circuit Judge and Hon. H. D. Clayton, United States District Judge.

Among the proceedings had and done were the following, to-wit:

2 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Indivi-ually, and W. J. MILLER, as State Auditor and Individually.

To the Honorable Judges of the District Court of the United States for the Southern District of Mississippi, sitting in equity:

Southeastern Express Company brings this bill of Complaint against Stokes V. Robertson, State Revenue Agent of the State of Mississippi, both as an individual and in his official capactiy as said State Revenue Agent, and W. J. Miller, both as an individual and in his official capacity as State Auditor of the State of Mississippi, and respectfully shows unto your Honors the following facts, to wit:

1st.

That the said Southeastern Express Company, Complainant, is a corporation chartered and created under the Laws of the State of Alabama, with its principal office in the City of Birmingham,
3 Alabama, and is a citizen and inhabitant of the said State of Alabama.

2nd.

The defendants are both citizens of the State of Mississippi, and are residents and inhabitants of the Southern District thereof.

3rd.

The suit is of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, is wholly between citizens of different states, and also involves controversies arising under the Constitution and Laws of the United States.

4th.

Complainant is engaged in business in the State of Mississippi as a common carrier in carrying and handling express in both interstate and intrastate commerce, having complied with all the requirements of the valid laws of said state of Mississippi essential to the doing of an express business therein.

Complainant is operating its express business both interstate and intrastate in said State of Mississippi over the following lines of railroad, and over the mileage of railroads trackage shown as to each separate line.

4

Tracks of Alabama Great Southern Railroad	18.78 miles.
Tracks of New Orleans & North Eastern Railroad	153.17 miles.
Tracks of Southern Railway, Okolona Branch	37.45 miles.
Tracks of Memphis & Charleston (Southern Railway)	34.20 miles.
Tracks of Mobile & Ohio Railroad	315.58 miles.
Tracks of Columbus & Greenville Railroad	197.53 miles.

Complainant carries intrastate express only from station to station in the State of Mississippi, and it carries interstate express, but no intrastate express, over the following of the said railroad tracks:

Alabama Great Southern Railroad, from Alabama State line to Kewanee Station	1.98 miles.
Columbus & Greenville Railroad, from Alabama State line to Steen Station	2.59 miles.
Southern Railway (Memphis & Charleston), from Alabama State Line to Iuka	6.5 miles.
Mobile & Ohio Railroad, from Tennessee State line to Corrinth	4.9 miles.
From Alabama State line to McCrary	.06 miles.
New Orleans & North Eastern Railroad from Louisiana State line to Nicholson	.27 miles.

5th.

Complainant began doing business as an express company in the State of Mississippi on the first day of May, 1921, such business including the carrying and handling of express shipments from points outside of the State of Mississippi to points within the State of Mississippi, from points within the State of Mississippi to points

outside the State of Mississippi, from points outside the State
5 of Mississippi through the State of Mississippi to points beyond the said State of Mississippi, and from points within the State of Mississippi to other points within said State.

6th.

Complainant shows that there is a certain statute of the State of Mississippi which undertakes to exact of every Express Company doing business in said State a so called privilege tax; the provisions of the statute in question under which privilege taxes are designed to be exacted of express companies being as follows: Section 21 of Chapter 104 of the Laws of the State of Mississippi of 1920, amending Section 14 of Chapter 94 of the Laws of 1910 (Hemingway's Code Section 6512) which provides as follows:

"Express Companies—On each Express Company transporting freight or passengers from one point to another in this State, $500.00, and $6.00 per mile on all first class railroad tracks in this State over which the business is operated, and $3.00 per mile on all second or third class railroad tracks in this State over which the business is operated."

Section 73 of Chapter 104 of the Laws of Mississippi of 1920 amending Section 3901 of the Code of 1906, provides as follows:

"Damages in case of failure to procure license—All persons, firms, partnerships or corporations liable for privilege taxes, who shall fail to procure the license therefor before beginning the busi-
6 ness taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has therefore paid a privilege tax, shall, in each or either such instance, be liable for double the amount of the tax, and it is hereby made the duty of the Tax Collector of the County in which such business is conducted to collect the amount, issue a separate license therefor, and to endorse across its face the words, 'Collected as Damages'."

7th.

Complainant further shows that under Section 71 of Chapter 104 of the Laws of Mississippi of 1920, amending Section 3894 Code of 1906, Express Companies are required to pay the privilege taxes sought to be exacted of them to the Auditor of Public Accounts, it being further provided upon the failure of an express company to pay said privileges tax it shall become liable to certain penalties and fines prescribed by the statute in question.

Complainant further shows that under Section 7056 of Hemingway's Code, the State Revenue Agent is empowered and it is made his duty to proceed against any express company for the collection of all taxes due and unpaid, and for all penalties and forfeitures following nonpayment and that privilege taxes sought to be imposed upon express companies as hereinbefore shown, and the forfeitures

and penalties following refusal to pay said privilege taxes fall within the provisions of said section, and that State Revenue Agent
7 has the power and it is made his duty to collect unpaid privilege taxes and penalties following failure or refusal to pay the same.

8th.

Complainant further shows that said privilege tax upon Express Companies provided by Section 21 of Chapter 104 of the Amendatory Laws of 1920 of the State of Mississippi hereinbefore referred to (Hemingway's Code, Section 6512) provides for the payment of an arbitrary amount of $500.00 upon each express company transporting freight or passengers from one point to another in the State of Mississippi, and further provides for the payment of $6.00 per mile on all first class railroad tracks in the State of Mississippi over which the business is operated, and $3.00 per mile on all second and third class railroad tracks in the State of Mississippi over which the business is operated.

Complainant alleges that so much of said statute as seeks to levy a tax of $6.00 per mile on all first class railroad tracks in the State of Mississippi over which an express business is operated, and $3.00 per mile on all second and third class railroad tracks in the State of Misissippi over which the business is operated is invalid, unconstitutional, null and void for the following reasons:

(*a*) The statute levying the tax does not define what are first, second or third classes of railroad tracks, and no provision is
8 made for the classification of railroad tracks over which an express company may do business into first, second or third classes. No standard is fixed by the statute in question by which railroad tracks over which an express business may be done can be graded, and complainant submits and contends that such classification for the purpose of taxing express companies in order to be reasonable must have a direct relation to the value of particular trackage in the doing of an express business, and that the statute in question having failed to define what are first, second, and third class railroad tracks in connection with the express business done over such tracks, and by reason of the absence of provision for the ascertainment by fair or reasonable test or standard what are first second, or third class railroad tracks as related to express business is vague, uncertain and indefinite.

(*b*) Said statute makes no provision for any hearing and accords no hearing to an express company for the ascertainment of what are first, second or third class railroad tracks, and while the said statute manifestly leads to the inference that it is intended to base the tax upon, and to vary the same according to some element of value and according to degrees of value, it fails to both prescribe the method of ascertaining value and of any particular railroad trackage for express purposes, and to give an express company opportunity
9 to be heard upon the question of value or the relative degrees of value according to difference in railroad tracks.

The statute, therefore, neither defines nor fixes any method of ascertaining what are first, second or third class railroads from the standpoint of an express business, and further fails to make provision for a hearing by an express company in determining what are first, second and third class railroad tracks.

Complainant avers that, upon the face of the statute providing for the exaction of said privilege tax against express companies, it is amendable to said tax, and that the same will become due, according to the terms of the statute, on or before May 1st 1922 when it begins its second year of business in the State of Mississippi.

It further avers that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920, amending Section 14 of Chapter 94 of the Laws of 1910 is unconstitutional and void for each and all of the reasons set forth in sub-divisions (*a*) and (*b*) of this paragraph; and it further avers and contends that the enforcement against complainant of said tax, under said void statute, will result in the taking of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States which among other provisions contains the following:

10 "Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law."

the right, privilege and protection of which constitutional provision complainant herein expressly sets up, claims and invokes.

9th.

Complainant further shows that not only does Section 21 of Chapter 104 of the Laws of 1920 of the State of Mississippi fail to prescribe or define what railroad tracks are first, second or third class in connection with the doing of an express business, and not only does said statute fail to authorize any tribunal or official so to determine as a basis for imposing privilege taxes on express companies, but that there is no other statute of the State of Mississippi which supplies such omission.

Complainant shows that Section 45 of Chapter 104 of the Laws of Mississippi for 1920 amending sections one and two of chapter 102 of the Laws of Mississippi of 1912 (Hemingway's Code, Section 6573) provides as follows:

"Railroads.—That Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on Railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on Railroads, such Railroads are divided into four classes—first, second, third and narrow gauge, and privilege taxes levied on them as follows: On each railroad of the first class, per mile $45.00; on each railroad of the second class, per mile $25.00; on each railroad of the third class, per mile $10.00; on each narrow gauge railroad, per mile, $2.50.

11 The Railroad Commission shall annually, on or before the first Monday in August, classify the several railroads according

to their charters and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the 1st day of December, and the finding of the said Railroad Commission shall be certified to the Auditor of Public Accounts and the Chancery Clerk of the County through which each road, or roads run, and any person, or persons, natural or artificial, who shall exercise any of the privileges taxed herein without first paying the tax and procuring the tax or license as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law."

Complainant respectfully shows and submits that the last above quoted section is entirely separate and distinct from section 21 of Chapter 104 of the Laws of 1920, and that the two sections have no connection with each other, and that there is no warrant for applying the classification of railroads made under said Section 45 in August, 1921, to the fixation and assessment of the privilege tax sought to be exacted of express companies under said Section 21 of Chapter 104 of the Laws of Mississippi of 1920. Said Section 45 requires the classification by the Mississippi Railroad Commission of railroad corporations and not railroad tracks, such classification being made upon the basis of the gross earnings of railroads and their charters.

Plaintiff further shows and submits that if Section 21 above quoted, could possibly be construed as a part of or in connection with said Section 45 of the Laws of Mississippi of 1920, or vice versa, and if said Section 21 could possibly be construed as requiring ex-
12 press companies to pay a privilege tax of $6.00 per mile on all tracks of first class railroads in the State of Mississippi over which said Express business is operated, $3.00 per mile on all tracks of second or third class railroads over which business is operated; that is to say, if the classification of railroads over which complainant operates in the State of Mississippi as made by the Railroad Commission under the provisions of said section 45 should be applied to complainant and should be required to pay the privilege tax upon the basis of the classes of railroads over which it operates, then complainant would be deprived of its property without due process of law, and would be denied the equal protection of the law, contrary to the provision of the Fourteenth Amendment hereinbefore quoted, and herein again invoked, for the reason that the classification of railroads into first, second and third class railroads under the said Section 45 is for the purpose of fixing the privilege tax to be paid by the railroads, and is based solely and exclusively upon the charters and gross earnings of said Railroads, and has no regard or relation to the charter rights or gross earnings, or the property or the business of complainant operating over the tracks of said railroads.

Complainant further shows that said Section 45 makes no provision for a hearing by it or any other express company in reference to such classification of railroads by the Railroad Commission, and com-
plainant submits, therefore, that if said Section 45 could
13 possibly be held as fixing the classification upon which the privilege tax prescribed by said section 21 is to be exacted of

complainant upon the basis of so much per mile for first, second, and third class railroad tracks, then complainant is further deprived of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States in that it is not accorded a hearing at the time and when said Railroad Commission fixes the classification of railroads under said Section 45, and it again sets up, claims, and invokes the protection of said constitutional provision upon this further ground.

And it further submits and contends that inasmuch as Railroads are accorded a hearing upon said classification by the Commission and no provision for express companies to be heard is made, an unwarranted and illegal discrimination will result as between railroads and express companies (in the event that express companies are bound by the classification of railroads provided by section 45) and complainant in such event would be deprived of the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States hereinbefore set up and invoked, herein again set up and invoked.

10th.

Complainant further alleges that the provisions of Section 21 of Chapter 104 of the Laws of 1920, which undertakes to levy a privilege tax against an express company of $6.00 per mile on all first class railroad tracks in the State of Mississippi over which business is done, and $3.00 per mile on all second or third class railroad tracks in said State over which business is operated, in terms, embraces the interstate business of complainant passing over railroad tracks which it operates in the State of Mississippi, and the tax provided by said above quoted portion of Section 21 is applied to interstate business as well as intrastate business, no separation being made by the statute as between the two classes of business.

Complainant further shows that the tax arising from said above quoted provision of Section 21 applies to every mile of railroad tracks over which complainant operates in the State of Mississippi, and it avers that there are certain miles of trackage over which it operates near the border of the State of Mississippi over which particular miles of trackage no intrastate traffic whatever passes, but only interstate traffic.

Complainant therefore sets up and alleges that the enforcement of the tax provided for in said portion of Section 21 will impose an immediate and direct burden upon interstate commerce, and that in consequence said provision of Section 21 is unconstitutional, null and void in that the same is in conflict with Article One, Section Eight, and Paragraph Three of the Constitution of the United States which, among other powers conferred upon the Congress of the United States, gives it the power to regulate commerce among the several States, the protection of which constitutional provision complainant herein expressly claims, sets up and invokes.

11th.

Complainant further shows that even if section 45 of Chapter 104 of the Laws of Mississippi of 1920 should be considered and held to be correlated to and supplementary of Section 21 of Chapter 104 of the Laws of 1920, consideration must be had for the fact that Section 45 provides for an annual classification to be made on or before the first Monday in August in each year, it being further provided that the privilege taxes based upon said classification shall be paid on or before the first day of December in each year.

Complainant respectfully shows that the privilege tax which the defendant will seek to enforce against and exact of it on May 1st, 1922, will be based, as complainant is informed and believes, upon the classification of railroads made on or about August 1st, 1921, and in consequence, complainant will not receive the benefit of the classification which the Railroad Commission of Mississippi will make on or about August 1st, 1922, although the privilege tax which will be demanded of it will be for the year beginning May 1st, 1922, and ending April 30th, 1923. And although it is in clear contemplation that the classification of railroads to be made by the Railroad

16 Commission on or about August 1st, 1922, shall govern the privilege taxes to be collected from railroads for the year following such classification, complainant for eight months of the year 1922, and four months of the year 1923, will be required to pay under the classification made in the year 1921 and not according to classification made on or about August 1st, 1922, and complainant further shows that the same irregularities, discrepancy, and discrimination from which it will suffer in the manner above pointed out for the present year will continue for each succeeding year, if said privilege tax is enforced against it.

Complainant further shows that there exists in the State of Mississippi no statute or law under which this irregularity, discrimination, and injustice can be corrected. And it further avers that there is no provision of law in the State of Mississippi under which a privilege tax can be required for a portion of a year. Railroads which pay a privilege tax under said Section 45 are assessed for the calendar year according to the classification made on August 1st, 1922, and are given until the first day of December in each year in which to pay said privilege tax. Upon the other hand, the privilege tax levied upon express companies will be demanded of complainant on the 1st day of May, 1922 upon the classification made in August of 1921, and the same will be assessed without regard to the classification which will be made for railroads on or before August 1st, 1922, under said Section 45.

Complainant avers and sets up that the enforcement of a privilege

17 tax against it for the year beginning May 1st, 1922, and ending April 30th, 1923, according to a classification of railroads made in the year 1921, and not in the year 1922, will result in the taking of its property without due process of law, and will deny it the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United

States, hereinbefore invoked, the protection of which constitutional provision, it, in this direct connection sets up, claims and invokes.

12th.

Complainant upon entering business within the State of Mississippi on May 1st, 1921, failed to pay the privilege tax provided for express companies, and said defendant Stokes V. Robertson, in his capacity of State Revenue Agent assessed a privilege tax against complainant in the amount of $4,325.33 and also assessed as damages on account of plaintiff's failure to pay the same a like amount, making a total assessment of $8,650.66, for which aggregate amount said defendant, Robertson, began suit against complainant. Which suit is now pending. Complainant shows, therefore, that if it fails and refuses to pay the said privilege tax on or before May 1st, 1922, that it can be and doubtless will be proceeded against, not only for the amount of its privilege tax measured according to railroad trackage over which it operates, but also will be liable to a double
18 assessment by way of damages, and perhaps to other penalties.

It shows, therefore, that its refusal to pay said privilege tax upon the ground that the same is invalid and unconstitutional will be at a great risk, and that in order to test the legality, validity and constitutionality of said privilege tax herein attacked, without too much risk, and in an orderly and proper way, it is necessary to invoke the aid of this Court of Equity in order that it may assert its rights and contest the valid-ty of said privilege tax without danger of being unduly penalized and subjected to exorbitant and severe damages and penalties.

In this situation it respectfully submits that it has no adequate remedy at law, and that it cannot secure full protection without resorting to a court of equity, and without invoking the extraordinary remedies of such court. Complainant further shows that said defendant, W. J. Miller, as Auditor of the State of Mississippi is charged with the collection of the privilege tax from it, and that upon failure to pay said defendant, Stokes V. Robertson is empowered not only to assess said privilege tax, but also to assess in addition thereto as damages, a sum equal to the amount assessed as such privilege tax.

Complainant alleges that said defendants unless restrained from doing so, will undertake to enforce and collect not only a
19 privilege tax based upon the railroad trackage over which complainant operates in Mississippi, and according to a classification of such trackage as first, second or third class, under Section 45 of Chapter 104 of the Laws of Mississippi of 1920, but will also upon complainant's refusal to pay said privilege tax assess it in an equal amount by way of damages.

13th.

Complainant further alleges and sets up that the statutes of Mississippi requiring said privilege tax as well as the Statutes providing

for the assessment of damages and fixing other penalties, in the event the said tax should not be paid, are invalid, unconstitutional and void, for each and all of the reasons hereinbefore set forth; and that said defendants, in demanding payment of said tax and in proceeding to collect the same and to enforce the damages and penalties incident upon complainant's refusal to pay, will undertake to enforce void laws; and that in such undertaking they will not be acting under warrant of lawful authority but will become individual trespassers and wrong-doers; and that as such wrong-doers they can be proceeded against, to the end that they may be restrained and enjoined from committing the intended wrongs and form violating complainant's legal and constitutional rights.

14th.

Complainant further shows specifically that its remedies
20 at law are inadequate and ineffectual for the reason that unless it should obtain proper injunctive relief prior to May 1st, 1922 it will, as hereinbefore shown, be subjected to proceedings (and to the danger of a seizure of its property) not only for the amount of the privilege tax which may be assessed but also for an equal amount by way of damages and, perhaps, to further penalties; and that in this way irreparable injury, loss and damage will be visited upon it.

15th.

Complainant further alleges that immediate and irreparable loss or damage will result to it unless the defendants be temporarily restrained from undertaking to collect and enforce said privilege tax, damages and penalties by an order of this Court, issued without notice. It avers that unless such temporary restraining order be issued by this Honorable Court the defendants will assess said privilege tax against it as well as damages, immediately after May 1st, 1922, and that complainant will not only be subjected to a suit for the amount of such privilege tax as may be assessed and the possible seizure of its property, but also will be subjected to proceedings and possible seizure for an equal amount as damages, and will be harassed and involved in needless cost and expense; and therefore, in order for it to test its rights and contest the validity and constitutionality of said privilege tax without the hardship, vexa-
21 tion and peril hereinbefore set forth, it is necessary that said defendants, as above alleged, be temporarily restrained by an order, without notice, until a hearing for interlocutory injunction can be had.

Wherefore, complainant waiving discovery from each and both of said defendants, under oath or otherwise, respectfully prays as follows:

First. That it be decreed that Section 21 of Chapter 104 of the Amendatory Laws of 1920 of the State of Mississippi be decreed to

be unconstitutional, null and void upon each and all of the grounds set forth in this Bill of Complaint; and that the privilege tax sought to be enforced under said Section 21 of Chapter 104 of the Amendatory Laws of 1920 of the State of Mississippi be decreed to be illegal, void and unenforceable.

Second. That it be decreed that so much of Section 21 of Chapter 104 of the Laws of Mississippi of 1920 as provides for the exaction of a privilege tax upon express companies upon the basis of "Six Dollars per mile on all first class railroad tracks in this State over which the business is operated and Three Dollars per mile on all second and third class railroad tracks in this State over which the business is operated" is invalid, unconstitutional, null and void, and that the tax prescribed thereby is void and unenforceable;

Third. That said defendants, and each of them, both in
22 their official capacity and as individuals, be permanently enjoined from collecting, enforcing, or attempting to collect and enforce said privilege tax from and against complainant; and that each of said defendants be permanently enjoined from enforcing, collecting, and from attempting to enforce and collect any damages or penalties of any nature or kind on account of complainant's refusal to pay said privilege tax;

Fourth. Complainant prays that an injunction pendente lite may be issued against said defendants restraining and enjoining then in the respects as to which permanent injunction is sought;

Fifth. That in order that irreparable loss and damage may not result to complainant a restraining order, without notice, be issued by the Court restraining said defendants in the manner and in the respects as to which permanent and interlocutory injunctions are prayed. Said temporary restraining order to remain in force until hearing can be had.

Sixth. Complainant prays that subpœnas as provided by law, in accordance with the rules and practices of the Court, may be issued, directed to each and both of said defendants, commanding them to be and appear upon a day set to answer this complainant.

Seventh. Complainant prays for such other and further relief as may be meet and equitable.

SANDERS McDANIEL,
H. L. GREENE,
BOZEMAN & CAMERON,
Solicitors for Southeastern Express Company, Complainant.

23 STATE OF MISSISSIPPI,
County of Lauderdale:

In person before the undersigned, and officer of said State and County, empowered and qualified to administer oath, came R. G. West who being duly sworn, deposes and says that he is Agent of

Complainant, Southeastern Express Company attached to the office of Division Superintendent, and that his duties for said Company make him familiar with the matters and things set forth in the foregoing Bill of Complaint, and that he — authorized to make this affidavit.

Deponent says that the averments contained in said Bill of Complaint insofar as such averments consist of positive statements of facts are true; insofar as said averments are based upon information and belief he verily believes them to be true and insofar as said averments consist of statements and conclusions of law he verily believes them to be true.

Deponent further says that it is necessary that a temporary restraining order be granted, as prayed, in order that the complainant shall not suffer irreparable loss or damage.

R. G. WEST.

Sworn to and subscribed before me, this the 26 day of April, 1922.

MARGUERITE FISHEL,
Notary Public.

Indorsed: Filed April 27, 1922.

24 In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

v.

STOKES V. ROBERTSON, State Revenue Agent, et al.

Amendment to Bill.

To the Honorable Judges of the District Court of the United States for the Southern District of Mississippi:

The complainant, amending its bill by leave of Court, respectfully shows the court further, that the privilege tax demanded of it under the laws of Mississippi in question on the basis of the classification of railroads by the State Railroad Commission under the provisions of Sec. 45 of Chap. 104 of the Laws of 1920, amounts to more than $4,000, and exceeds the amount of the entire net earnings of the complainant on all its intrastate business for the year ending May 1, 1922, being $1,289.39, by approximately $3,000. And complainant says and charges therefore that said privilege tax is confiscatory and the informant thereof would take the property in violation of the provisions of the 14th Amendment to the Constitution of the United States, and that as said Sec. 21 of Chap. 104 of the Laws of Mississippi, if it is to be applied in connection with said Sec. 45, is void and not enforcible.

SANDERS McDANIEL,
BOZEMAN & CAMERON,
Attorneys for Complainant.

25 Personally appeared E. H. Goodrich, District Superintendent and Agent of Complainant, who, being duly sworn, says that the facts stated in the foregoing amendment to the bill are true as stated.

E. H. GOODRICH.

Sworn to and subscribed before me this 24th day of June, 1922.

JACK THOMPSON,
Clerk W. S. Dist. Court, Southern Dist. Mississippi,
By GEO. P. MONEY,
D. C.

Indorsed: Filed June 24, 1922.

26 In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually; W. J. MILLER, as State Auditor and Individually.

To the Honorable the Judge of the United States District Court for the Southern District of Mississippi:

Now, this day, comes the Complainant, Southeastern Express Company, and files this its application to this court, and prays the court that, as provided by the Statutes of the United States, he call to his assistance to hear and determine the Complainant's application for an interlocutory injunction prayed for two other judges, all in manner and form as provided by Statute; and that in the mean time Complainant may have a temporary restraining order, as authorized by said statute.

SANDERS & McDANIEL,
H. L. GREENE,
BOZEMAN & CAMERON,
Attorneys for Complainant.

Indorsed: Filed April 27, 1922.

27 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

v.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

Whereas, in the above cause, it has been made to appear from the bill of complaint herein filed that a writ of injunction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto, enjoining the defendants from the acts complained of and about to be committed;

Now, on motion of said complainant, it is ordered that defendants appear before the judge of the District Court of the United States for the Southern District of Mississippi, and a judge of the Circuit Court of the United States, and another district judge of the United States Court, sitting to hear the matter on the 6th day of May, 1922, at 10 o'clock a. m. at the city of New Orleans, in the State of Louisiana, and then and there to show cause, if any they have, why the preliminary injunction herein prayed for should not issue.

And it being made to appear from specific facts shown by
28 the verified bill that immediate and irreparable injury, loss or damage will result to the complainant before notice can be served and hearing had thereon, and that a temporary restraining order should be granted without notice, it is further ordered that upon complainant's giving security in the penalty of $5,000.00 to be approved by the clerk of the court, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby, that a temporary restraining order issue as provided by statute, restraining the defendants, and each of them, their agents and attorneys, from collecting or undertaking to collect, or enforce from complainant, any privilege tax, damages, or penalties for the year beginning May 1st, 1922, under the laws of the State of Mississippi, except the $500.00 prescribed by Sec. 21 of Chapter 104 of the Laws of 1920.

It is further ordered that said temporary restraining order expire at the time of said hearing on the 6th day of May, 1922, unless within such time the said order is extended as authorized by statute.

It is further ordered that a copy of this order, certified under the hands of the clerk and seal of this court, be served on each of the defendants hereto, to-wit, Stokes V. Robertson, as State Revenue
29 Agent and individually, and W. J. Miller, as State Auditor, and individually, and that the hearing of this cause on appli-

cation for an interlocutory injunction be had and proceeded with in accordance with Sec. 266 of the Judicial Code of the United States as amended.

Ordered at chambers in Yazoo City, Mississippi, this the 27th day of April, 1922.

EDWIN R. HOLMES,
U. S. District Judge.

Indorsed: Filed April 27, 1922.

20 UNITED STATES OF AMERICA,
Southern District of Miss., ss.:

The President of the United States to the Marshal of the Southern District of Mississippi, Greeting:

You are hereby commanded, without delay, to summon Stokes V. Robertson State Rev. Agent W. J. Miller State Auditor citizen- of the State of Mississippi, to appear before the District Court of the United States for the Southern District of Mississippi at the City of Jackson, at Rules, to be holden in the Clerk's office of said Court, on *the* May 18th, 1922, next, to answer a Bill of Equity exhibited against them by Southeastern Express Co. praying for a decree to enjoin the collection of damages and penalties etc. which is more fully set out in the Original Bill now on file in the U. S Clerk's office at Jackson, Miss., *citizen of the State of* — and
31 unless they shall enter their appearance therein; in the Clerk's office aforesaid, on or before the time specified above, the said Bill will be taken for confessed. And have then there this Writ, and how you have executed the same.

Witness the Honorable E. R. Holmes, Judge of the District Court of the United States, and the Seal of our said District Court, this 29th day of Apr. 1922, A. D. 19—.

JACK THOMPSON,
Clerk.

The defendants above named *is* hereby notified that they be required to enter their appearance in the Clerk's office of the United States District Court, on or before *the* 20 days after the service of this writ *19* otherwise the bill may be taken pro confesso.

JACK THOMPSON,
Clerk.

Executed April 29, 1922.

32 In the District Court of the United States for the Southern District of Mississippi.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

Whereas in the above cause a motion for the issuance of a preliminary writ of injunction has been duly filed, to be heard at New Orleans, La., on May 6th, 1922, at 10 o'clock A. M. And it having been made to appear from the specific facts shown by the verified bill that immediate and irreparable injury, loss or damage will result to the complainant before notice can be served and hearing had thereon, unless the said defendants are, pending such hearing, restrained as herein set forth;

Now, Therefore, take notice that you, Stokes V. Robertson as State Revenue Agent and individually, and W. J. Miller, as State Auditor, and individually, defendants, herein, your agents and attorneys and each of you are hereby specially restrained from collecting or undertaking to collect or enforce from Complainant any privilege tax, damages or penalties for the year beginning May 1, 1922, under the Laws of the State of Mississippi except the $500.00 prescribed by Section 21 of Chapter 104 of the Laws of Mississippi of 1920, until the hearing of said application for a preliminary injunction on the said May 6th, 1922, or until the further order of the court extending this order and writ.

Witness the Honorable Edwin R. Holmes, Judge of U. S. District Court of the Southern District of Mississippi, this 29th day of April, 1922.

JACK THOMPSON,
Clerk of said Court.

To the Marshall of said Court to execute and return, together with a certified copy of the bill and restraining order of date April 27, 1922.

JACK THOMPSON,
Clerk of said Court.

Executed this writ by handing a true copy of summons and restrai-ng order to Stokes V. Robertson & W. J. Miller at Jackson on 4-29-22.

FLOYD LOLER,
U. S. Marshal,
By J. H. WILLIAMS,
Deputy.

22 In the District Court of the United States for the Southern District of Mississippi.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

Know all men by these presents: That we, Southeastern Express Company as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the Defendants, Stokes V. Robertson, as State Revenue Agent, and individually, and W. J. Miller, as State Auditor and individually, in the penal sum of five thousand dollars, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Witness our hands, this 28th day of April, 1922.

The condition of this obligation is such, that whereas the above bound complainant, Southeastern Express Company, has prayed and obtained a temporary restraining order, restraining said defendants, and each of them, their agents and attorneys from collecting or undertaking to collect or enforce from complainant any privi-
23 lege tax, damages or penalties for the year beginning May 1st, 1922, under the Laws of the State of Mississippi, except the $500.00 prescribed by Sec. 21 of Ch. 104 of the Laws of Mississippi of 1920; such restraining order to expire on May 6th, 1922, unless extended as authorized by statute. Now, if the said Southeastern Express Company shall pay all such costs and damages as may be incurred by any party who may be found to have been wrongfully enjoined or restrained thereby, then this obligation to be void, else to remain in full force and effect.

SOUTHEASTERN EXPRESS COMPANY,
By BOZEMAN & CAMERON,
FIDELITY & DEPOSIT CO. OF MARYLAND,
By B. H. GRIMES & CO.,
Agts.
BASKIN & WILBORN,
Atty. in Fact.

Approved Apr. 29th, 1922.
JACK THOMPSON,
Clerk.

Indorsed: Filed April 29, 1922.

35 In the U. S. District Court, Jackson, Miss., May 3, 1921.

In Equity.

SOUTHEASTERN EXPRESS CO.

vs.

W. J. MILLER, State Auditor, and STOKES V. ROBERTSON, Revenue Agent.

To the Honorable Edwin R. Holmes, Judge of the said Court:

Come the complainant and the defendants and move the Court to continue the hearing of the complainant's application for a preliminary injunction until May 20th, 1922, at 10 A. M. at New Orleans, Louisiana; the restraining order to remain in force and effect and to be extended until the said hearing.

W. J. MILLER,
Auditor of Public Accounts.
STOKES V. ROBERTSON,
State Revenue Agent.
SOUTHEASTERN EXPRESS COMPANY,
By SANDERS McDANIEL,
A. S. BOZEMAN,
Attorneys.

Indorsed: Filed May 3, 1922.

36 In the District Court of the United States, Jackson Division, Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

Upon filing and hearing the application of complainant and defendants to continue the hearing of complainant's application for the preliminary injunction until May 20th 1922 at 10 o'clock A. M. at New Orleans, La., the restraining order to remain in force and effect and to be extended until said hearing; It is ordered that said application be granted; that Complainant's application for a preliminary injunction and the hearing thereof be continued until May 20th, 1922 at 10 o'clock A. M. at New Orleans, La., and that temporary restraining order and writ heretofore made and issued

herein remain in force and effect and be extended until the hearing and determination of said application for a preliminary injunction.

Ordered adjudged and decreed this 3rd day of May 1922.

EDWIN R. HOLMES,
Judge.

Indorsed: Filed May 3, 1922.

37 In the District Court of the United States, Jackson Division, Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

By consent of the parties made known to the Court, it is ordered that the hearing of complainant's application for a preliminary injunction be again continued until June 20th 1922 at 10 o'clock A. M. at Biloxi, Mississippi, and that the temporary restraining order and writ heretofore made and issued herein remain in force and effect and be extended until the hearing and determination of said application for preliminary injunction.

Ordered, adjudged and decreed, this the 20th, day of May, 1922.

EDWIN R. HOLMES,
Judge.

38 In the District Court of the United States, Jackson Division, Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

It being necessary to again defer the hearing of complainant's application for a preliminary injunction, by reason of the inability to procure the three judges necessary to hear said application on June 20th 1922, and all parties consenting to the postponement of said hearing; It is thereupon ordered that the hearing of said application be again continued until June 24th, 1922 at 10 o'clock A. M.

at Biloxi, Mississippi, and that the temporary restraining order and writ heretofore made and issued herein, remain in force and effect and be extended until the hearing and determination of said application for preliminary injunction.

Ordered, adjudged and decreed this 20th day of June, 1922.

EDWIN R. HOLMES,
Judge.

39 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. —.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

Answer of the Defendants.

Comes Stokes V. Robertson as State Revenue Agent and individually and W. J. Miller, as State Auditor and individually, defendants in the above styled cause and for answer to complainant's bill herein filed against them, say:

(1)

Defendants admit that the Southeastern Express Company is a corporation chartered under the laws of the State of Alabama, with its principal office in the City of Birmingham, Alabama, so far as defendants are advised and believe.

(2)

The defendants individually are both citizens of the State of Mississippi and are residents of the Southern District thereof.

(3)

Defendants deny that this suit is of a civil nature where the matter in controversy exceeds the sum of $3,000.00, and is wholly
40 between citizens of different states, and involving controversies arising under the constitution and Laws of the United States, such as to give this Court jurisdiction of this cause.

Defendants show that while complainant has beclouded the real nature of this suit by naming Stokes V. Robertson and W. J. Miller individually as defendants, it fairly appears from the bill that said

individual defendants are not sued as such, nor can they be individually held liable in any way by reason of the matters and things contained in complainant's bill. That it fairly appears from the said bill that this said suit is an attempt to enjoin the Revenue Agent and the State Auditor, officers of the State of Mississippi from performing the duties of their office imposed upon them by the laws of Mississippi. Therefore, *said* suit is in its very nature and *affect*, a suit against the Sover-ign State of Mississippi and not maintainable in this Honorable Court.

(4)

Defendants admit that the complainant is a common carrier engaged in the carrying and handling of express in both interstate and intrastate commerce, but the defendants are without knowledge whether complainant has complied with all the requirements of the laws of Mississippi essential to doing an express business
41 therein, except as to the payment of privilege taxes, which defendants state this complainant has arbitrarily and willfully refused to pay.

Defendants admit that the complainant is operating its express business over many lines of railroads, and so far as defendants are advised, the mil-age of railroad trackage listed in the complainant's bill is correct, but defendants do not herewith admit its correctness in every detail, but state that the same is a matter easily a-certainable and over which there should be and can be no dispute. In the same way defendants believe that the mileage listed in complainant's bill over which complainant carries interstate express is correct, but, the same is a matter of statistics and calculation over which there should be and can be no conflict and defendants only admit said figures to the extent that they are actually correct.

Defendants admit that complainant began doing business as an express company in the state of Mississippi on May 1st, 1921, and that such business included the carrying and handling of express shipments to and from points within the State of Mississippi and to and from points within and out the State of Mississippi, and to and from points out of the State of Mississippi, wherein shipments to and from such points passed through the State of Mississippi.

(6)

Defendants admit that under and by virtue of Section 21
42 of Chapter 104 of the Laws of Mississippi of 1920, there is exacted of each express company doing business in the State of Mississippi a privilege tax, and that said statute is in words and figures as set out in Item 6 of complainant's bill.

Defendant admits that Section 73 of Chapter 104 of the Laws of Mississippi of 1920 provides damages for failure to procure license against all persons, firms, corporations, etc., in the manner and form as set out in Item 6 of complainant's bill.

(7)

Defendants admit that under Section 71 of Chapter 104 of the Laws of Mississippi of 1920, Express companies are required to pay the privilege taxes exacted of them by law to the Auditor of Public Accounts, and that said Section further provides that upon the failure to pay said privilege tax, anyone, person, firm, partnership, association or corporation, who fails to pay the license required for privileges fixed by law, shall become liable to certain penalties and fines prescribed by said statute.

Defendants admit that under Section 1057 of Hemingway's Code of Mississippi, the State Revenue Agent is empowered and it is made his duty to proceed against all persons, corporations, etc., for the collection of all past due and unpaid taxes, and for all penalties and forfeitures following non-payment, and that under said
43 statute, it is the duty of the said Revenue Agent to proceed against any Express Company for the collection of any and all privilege taxes that may be due and unpaid by such Express Company.

(8)

Defendants admit that under and by virtue of Section 21 of Chapter 104 of the Laws of Mississippi of 1920 every express company transporting freight or passengers from one point to another within the State of Mississippi, shall pay a privilege license of $500.00 and $6.00 per mile on all first class railroad tracks and $3.00 per mile on all second and third class railroad tracks over which the business is operated in the State of Mississippi.

Defendants deny that so much of such statute as seeks to levy a tax of $6.00 per mile on all first class railroad tracks and $3.00 per mile on all second and third class railroad tracks as above set out, is invalid and unconstitutional, for the reasons set out in complainant's bill or for any other reasons.

In answer to the reasons indicated in Section A of Item 8 of complainant's bill upon which complainant claims said act unconstitutional, defendants would state: Defendants say that while the particular Section No. 21 of Chapter 104 of the Laws of Mississippi of 1920 does not define what are first, second and third class
44 railroad tracks. That elsewhere in the same chapter 104 of the Laws of Mississippi of 1920, classification of railroad tracks into first, second and third classes is fully provided for and said classification when and as made by such department as the law requires to do so, is a just and reasonable classification and a method of arriving at same, not only for the railroad companies themselves, but for the purpose of fixing a privilege tax on such Express Companies as may operate upon said railroad lines. That it was not necessary for the particular Section 21 to define what are first, second and third class railroad tracks, since said classes of railroad tracks are determined in the manner and form as elsewhere provided by the laws of Mississippi as above stated.

Defendants would state in answer to the reason listed as Section B of Item 8 of complainant's bill upon which complainant seeks to maintain the unconstitutionality of Section 21, Chapter 104 of the Laws of Mississippi of 1920, defendants would state that while the said Section 21 makes no provisions for any hearings *be* an express company for the ascertainment of what are first, second and third class railroad tracks, it is not necessary since under a valid and reasonable statute contained in the same Ch*pa*ter under "Privilege Taxes," to-wit: Chapter 104 of the Laws of Mississippi of 1920, a competent and reasonable method of ascertaining the value or classification of any particular railroad trackage is provided for. Defendants
45 further state that such objection- as raised by complainant are not well founded for the further reason that under the Laws of the State of Mississippi, any person or corporation, which would include Express Companies, can raise any objection or defense to the payment of any tax which is claimed to be unlawful, and the Statutes of Mississippi allow anyone ample privilege of contesting in the state Courts any tax, privilege or otherwise, levied against them; and further Express Companies being common carriers and under the supervision of the Railroad Commission of the State of Mississippi, would have the right and privilege as parties in interest to make objection and contest before the aforesaid Railroad Commission respecting the classification of railroad trackage in Mississippi.

Defendants admit that comp*al*inant was liable for the privilege tax due the State of Mississippi on May 1st, 1922, and that the said tax not having been paid during the month of May, 1922, said complainant is liable in damages for an amount equal to the total amount of said privilege tax.

Defendants deny that Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is unconstitutional and void, for the reason set out in complainant's Bill and deny that to enforce the privilege tax due by complainant, would result in depriving complainant of its property without due process of law, contrary to the Four-
46 teenth Amendment to the Constitution of the United States.

(9)

Defendants deny that there is no statute of Mississippi other than Section 21, Chapter 104, of the Laws of Mississippi of 1920, which provides a method of ascertaining and defining what railroad tracks are first, second and third class, but says that Section 45, Chapter 104 of the Laws of Mississippi for 1920 provides a reasonable and adequate method of determining what shall be the classification of railroad trackage in Mississippi. Said statute — substantially quoted in complainant's bill in Item 9 thereof.

Defendants deny that there is no connection between said Section-21 and 45 of Chapter 104 of the Laws of Mississippi of 1920, but defendants state that said sections are part of the same Chapter of the Laws of Mississippi of 1920, and are made and enforced as a part of the same Chapter of Memingway's Code of Mississippi and that the complainant cannot be heard to complain in regard to such

method of classification without showing that the said classification was wilfully and fraudulently made.

Defendants would further show that complainant as well as the railroad companies are under the supervision of the Railroad Commission of the State of Mississippi, and that the complainant, as well as other Express companies, have the legal right to make any defense, objection and contention before the Railroad Com-
47 mission, respecting their right and privileges of doing business in Mississippi, and complainant, and any other express company are not deprived of a right to a hearing before said Railroad Commission respecting said classification or railroad trackage.

Defendants deny that if said Section 45 should be applied to complainant and it be required to pay a privilege tax based upon the class of railroads over which it operates, complainant would be deprived of its property without due process of law, as set out in complainant's bill.

Defendants therefore deny that the Express companies being parties in interest cannot under the laws of the State of Mississippi be accorded a hearing regarding any classification by the Railroad Commission and therefore deny that unwarranted and unjust discrimination will result between the railroad and express companies. Defendants further state that the question to be presented before this Court and upon which this Court can only take cognizance, is whether or not there has been an unlawful discrimination by the Railroad and Express Companies, and not whether or not there may be at some future time such discrimination: Further, it is not an unreasonable classification as a matter of law for railroad and express companies to be differently classified for the purpose of taxation under the Laws of Mississippi, provided there is no discrimi-
48 nation between the express companies as such, and therefore, the method of levying privilege taxes upon the basis and according to the Laws of the State of Mississippi, is not contrary to the Fourteenth Amendment of the Constitution of the United States, as hereinbefore set out.

(10)

Defendants deny that the provisions of Section 21 *is* unconstitutional for the reason that the classification provided by law on the basis of railroad tracks in the State of Mississippi embraces the interstate business of complainant passing over railroads which it operates in the State of Mississippi, since the basis of classification in respect to railroad trackage includes only the mil-age of such trackage within the State of Mississippi and is a valid classification under the laws of the State of Mississippi and the laws and Constitution of the United States, and such method of classification is valid even though such privilege tax based thereon may indirectly affect its interstate business. Defendants therefore deny that the enforcement of the tax provided for in said Section 21 will impose an immediate and direct burden upon interstate commerce, and is therefore null and void in that the same is in conflict with Article One, Section

Eight and Paragraph 3 of the Constitution of the United States, dealing with the power to regulate commerce among the several states.

49 (11)

Defendants deny that the complainant has a just and reasonable complaint on the ground that such privilege tax, as it may be required to pay during May of each year, may be based upon the classification of railroads which may be made on or about August 1st of the year preceding. Defendants state that the amount of privilege tax to be paid by express companies during May of each year, after they have been doing business in the State of Mississippi, is a definite and fixed amount based upon the classification of the railroad trackage then in force, such as may have been made by the Railroad Commission of the State of Mississippi on or about August 1st. of each year preceding and that if any different classification of the said railroads by the said Railroad Commission shall thereafter be made during the month of August of the same year, the said express companies will be entitled to the same basis of classification in arriving at what privilege taxes they shall pay during the month of May following. Defendants state that the fact that the classification of said railroads may be made at a time in each year prior to the time when the privilege tax of express companies are payable thereon, does not render said basis of taxation unreasonable or void for the reason set out in complainant's bill, but is a reasonable basis of classification in arriving at a definite fixed amount of privilege taxes to be paid by such express companies; and furthermore, the con-
50 tention of complainant in this respect assumes that there may be an unlawful discrimination in violation of the Constitution of the United States and this Court cannot presume that the taxing authorities can or will indulge in that unlawful discrimination against express companies, and the question must necessarily be whether or not there is in fact any unreasonable or unwarranted classification such as may be violative of the Fourteenth Amendment of the Constitution of the United States.

(12)

Defendants admit that complainant upon entering business in the State of Mississippi on May 1st, 1921 failed to pay the privilege tax provided for express companies, and that the defendant, Stokes V. Robertson in his official capacity as State Revenue Agent, assessed a privilege tax against complainant in the sum of $4,325.33, and also assessed as damages on account of complainant's failure to pay the same, a like amount, making a total assessment of $8,650,66. Defendants admit that the said Stokes V. Robertson, State Revenue Agent, instituted suit against complainant for said sum in the Circuit Court of Lauderdale County, State of Mississippi, and that said suit is now pending. Defendants state that complainant has failed to pay the privilege tax due by it to the State of Mississippi on May

1st, 1922, and that by reason of such failure, said complain-
51 ant is indebted to the State of Mississippi for the said tax and damages provided by law, aggregating an additional amount of $8,650.66, and said Robertson, Revenue Agent, is not only authorized, but is required by law to collect said taxes and damages.

Defendants deny that its refusal to pay said privilege tax on the ground that the same is invalid and unconstitutional will be a great risk and that complainant has an adequate and complete remedy at law such as will deprive it of the aid of this Court of Equity. Defendants state that such damages as the complainant may be liable for by virtue of its refusal to pay said tax as provided by the Laws of Mississippi, is the result of complainant's own wilfulness and neglect: That complainant could have paid the said privilege tax when due under protest and thereafter recovered said tax if the same was illegal and void by the proper legal machinery provided by the Laws of Mississippi, and thus complainant would not have run the risk of incurring the damages which the law provides.

Defendants state that complainant is not entitled to a restraining order against the defendants to prevent defendants from undertaking to enforce and collect by proper legal methods, as the Laws of Mississippi require them to do, the privilege tax and damages due the State of Mississippi by complainant.

(13)

Defendants deny that the statute of Mississippi requiring
52 the payment of said privilege tax as well as the statute providing for the assessment of damages and fixing other penalties in the event the said tax should not be paid are invalid, unconstitutional and void for each of the reasons set out in complainant's bill. Defendants further deny that if each of the defendants attempt to enforce said laws, they will be acting without warrant of lawful authority and they will become individual trespassers and wrong-doers. Defendants state that the Court will not assume that those lawful officer- of the State of Mississippi, will violate any law of the State, and individually inflict any wrong upon complainant, and that the mere allegation in respect thereto in complainant's bill is not sufficient to enable this Court to entertain jurisdiction of this cause on the theory that this said suit is not one entirely in effect against the State of Mississippi.

(14)

Defendants deny that the complainant was entitled to a restraining order, or is entitled to the injunction prayed for, for the reason that if the same is not issued it will suffer irreparable injury, loss and damage, but that the amount of liability of the complainant for the privilege tax and damages is a known definite amount and the only reason or occasion for the complainant to suffer the payment of damages is its own arbitrary refusal to pay the privilege tax to

the State of Mississippi as provided by law. Defendants further show that the complainant has an adequate remedy at law
53 and under the laws of the State of Mississippi could test out or try the issue of the constitutionality of the tax laws herein referred to or otherwise defend, contest and restrain the collection of any privilege taxes claimed to be in violation of law, and this could be done in such a way as to save complainant harmless from any damages in the event of an adverse decision.

(15)

As already set out defendants deny that the complainant will suffer immediate and irreparable injury, loss or damage unless the defendants be restrained, but defendants having already been restrained by order of this Court, defendants now pray this court that said restraining order be dissolved and complainant pay such damages as may be found to be due defendants by reason of the wrongful suing out of said restraining order.

And now having fully answered, defendants pray and herewith move the Court to vacate the restraining order now issued in this cause and that they may be dismissed with all reasonable costs and damages.

ALEXANDER & ALEXANDER,
Attorneys for Defendants.

54 In Equity.

175.

SOUTHEASTERN EXPRESS CO.

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

This cause coming on this day to be heard upon application for a preliminary injunction, come the parties, and the court having heard the application and the argument of counsel, and having taken the matter under advisement. It is ordered that the temporary restraining order and writ heretofore made and issued herein remain in force and effect and be extended for a further period period of ten days from this date and until the determination of said application.

Ordered, adjudged and decreed this 24th day of June 1922.

E. R. HOLMES,
Judge.

55 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS CO.

vs.

STOKES V. ROBERTSON et al.

Answer of the Defendants to the Amendment to the Original Bill.

Comes Stokes V. Robertson individually and in his official capacity as State Revenue Agent, and W. J. Miller individually and in his official capacity as State Auditor, and for answer to the amendment to the original bill filed herein by complainant says:

Defendants do not deny that the amount of privilege tax due by the complainant on the basis of classification of railroads by the State Railroad Commission amounts to more than $4,000.00, but defendants deny that the said amount exceeds the entire net earnings of complainant on all of its intrastate business for the year. Defendants deny that the amount of privilege tax due by the complainant under and by virtue of the laws of the State of Mississippi is confiscatory and therefore in violation of the Fourteenth Amendment of the Constitution of the United States.

56 Defendants would show that complainant has only been in business in the State of Mississippi for about a year and that it is not a reasonable and proper basis upon which to determine whether the said privilege tax is or is not confiscatory to consider the earnings of complainant in the State of Mississippi for its first year of business therein, and that by virtue of the business in which complainant is engaged, and the necessary steps and dealings incident to establishing such business in the State of Mississippi, necessarily, the earnings of complainant in the State of Mississippi or in any State for the first year could not be expected to be hardly more than the expenses of operating in said State.

Wherefore, defendants deny that the said privilege tax due the State of Mississippi by complainant is confiscatory or in violation of the Fourteenth Amendment of the Constitution of the United States for the reasons set out in complainant's amendment to its original bill.

Defendants therefore reiterstate all of the matters and things set out in their answer herein and prays to be dismissed with their costs.

ALEXANDER & ELEXANDER,
Solicitors for Defendants.

57 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

175 (One Hundred Seventy Five).

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

Comes Lee M. Russell, Governor of the State of Mississippi, and Frank Roberson, Attorney General of the State of Mississippi, and waive notice of the hearing of the application of the complainant for a preliminary injunction, before the Honorable Edwin R. Holmes, District Judge, and two other judges of the United States Court at Biloxi, Mississippi, on June 24, 1922, and enter their appearance in the matter of said hearing, as of said 24th day of June, 1922, and submit to the Court that the statute of the State of Mississippi in question is not unconstitutional and that preliminary injunction should not be granted, for the reasons, among others, set out in the answer of the Defendants, Stokes V. Robertson, State Revenue Agent, and W. J. Miller, State Auditor, filed and presented by Alexander & Alexander, Attorneys for Stokes V. Robertson, State Revenue Agent, which answer they adopt.

LEE M. RUSSELL,
Gov. of the State of Mississippi.
FRANK ROBERSON,
Atty. Gen. of the State of Miss.

58 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS CO.

vs.

STOKES V. ROBERTSON, State Revenue Agent, et al.

The statement of evidence in condensed form prepared by Plaintiff in Error and the request of defendants in Error that the evidence be incorporated in the transcript in its entirety, and without abbreviation, having been presented to me, and being of the opinion that the request of defendants in Error should be granted; it is thereupon ordered that the evidence, being the affidavit of A. T. Perry,

and three certified copies of Orders of the Mississippi Railroad Commission be incorporated in the transcript and record in their entirety and without abbreviation.

This 14 day of July 1922.

EDWIN R. HOLMES,
Judge.

59 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON et al.

Application for Injunction, etc.

STATE OF GEORGIA,
Fulton County:

In person before the undersigned, a Notary Public in and for said County and an officer empowered to administer oath, comes A. T. Perry, who being duly sworn, deposes as follows:

Affiant is Auditor of the Southeastern Express Company and as such is in charge of all of the books and accounts of said Company and is the ranking fiscal officer of said Southeastern Express Company. Affiant has held the position of Auditor since the Southeastern Express Company began business on May 1st 1921.

The books, accounts and records of and relating to the intrastate business done by Southeastern Express Company in the State of Mississippi are in affiant's control and are being kept under his direction and supervision; and affiant has recently made an investigation respecting such intrastate business with a view of ascer-

60 taining the amount thereof and the proportion of such business per mile, according to the classification which the Railroad Commission of Mississippi on or about the first Monday in August 1921 made of the railroads over which the Southeastern Express Company operates in Mississippi.

Affiant has made inquiry with respect to the details of the classification made of railroads in Mississippi by the Railroad Commission of the State over which Southeastern Express Company operates, and according to this information the Southeastern Express Company is operating in Mississippi over 18.78 miles of the Alabama Great Southern which has been classified by said Commission as first class; 197.53 miles of the Columbus & Greenville which said Commission has classified as third class; 272.58 miles of the Mobile & Ohio which

the Commission has classified as first class and 43 miles of the Mobile and Ohio which has been classified by the Commission as second class; 153.17 miles of the New Orleans and Northeastern which the Commission has classified as first class; 34.20 miles of Southern Railway which the Commission has classified as first class and 37.45 miles of Southern Railway which said Commission has classified as second class.

Affiant has taken the gross intrastate receipts of the Southeastern Express Company for twelve month period beginning May
61 1st 1921 and ending April 30th 1922 and has apportioned said gross receipts to the first class mileage of railroads over which it operates in Mississippi, according to said Commission's classification, and to second and third class railroad mileage, as classified by the Railroad Commission over which it operates, and from the figures obtained has calculated the gross receipts produced per mile on all first class railroads according to said classification, and the gross receipts per mile on second and third class railroads also according to said classification; this calculation being made for the year above mentioned.

The method adopted by affiant in arriving at and apportioning said gross intrastate receipts to particular mileage, according to the classification of said Railroad Commission, and his further method of arr-ving at the gross intrastate receipts per mile of any particular class of railroad mileage, according to said Commission's classification, is as follows:

Affiant has taken the gross cash receipts on intrastate business at each station in the State of Mississippi. He has taken the aggregate gross cash receipts of all stations upon any particular class of railroad /ileage, according to the classification of the Railroad Commission and has divided the gross receipts from all stations on any particular railroad trackage.

62 Affiant states that the method adopted by him in arriving at the figures in question is the one in general use by transportation accounting authorities and such method is standard and is recognized by regulating Commissions of the country.

Affiant shows below the amount of intrastate business done as shown by the receipts in Mississippi for the twelve months beginning May 1st 1921 and ending April 30th 1922 apportioned to the railroad mileage, according to the classification of the Railroad Commission of Mississippi, and also the business do*en* according to the receipts per mile.

Name of railway line.	Classification of same by Miss. Com.	Amount of intrastate business according to receipts.	Mileage.	Business done according to receipts per mile.
Alabama Great Southern.....	1st	222.15	18.78	$11.83
Columbus & Greenville.....	3rd	31,428.16	197.53	159.10
Mobile & Ohio.....	1st	42,334.06	272.58	155.30
Mobile & Ohio.....	2nd	8,556.49	43.00	198.98
New Orleans & Northeastern....	1st	34,501.56	153.17	225.25
Southern Railway.....	1st	1,401.28	34.20	40.97
Southern Railway.....	2nd	3,055.96	37.45	81.60

Affiant has been in the express business thirty-two (32) years and has had experience in all of the departments of the express company. His accounting experience extends back for a period of twenty-two (22) years, and this and his other experience make him
63 familiar with the general features of the express business.

Affiant from his experience and observation states that there is no reasonable and fixed relationship between the value of an express business and the value of the business of a railroad over which the express company may operate its business. Different and independent conditions operate upon the express business from those which operate upon a railroad business. For instance, an express company might operate over a railroad which either a lucrative passenger business or a lucrative freight business or both and yet the express business might be small and unprofitable where the railroad business was very profitable, and the extent of and profitableness of a railroad business is no criterion as to the extent of or profitableness of the business of an express company operating over the particular railroad; and from his experience, knowledge and observation, affiant is prepared to state that in a State like Mississippi there is no direct relativity between the express business and the business of a railroad over which the express business may be done. Affiant further states that the classification of railroads for taxation upon the basis of the earnings of such railroad can furnish no reasonable criterion for
64 taxing the business of express companies done over such railroad.

Affiant has prepared a statement of the net income derived by the Southeastern through it operation in the State of Mississippi for the year beginning May 1st 1921 and ending April 30th 1922, and he has separated the interstate revenue from the intrastate revenue during this period. The gross receipts during such period upon the interstate business were $267,693.98, and the gross receipts from interstate business were $121,499.66, making the total of gross receipts on both interstate and intrastate business $389,193.64. The gross operating cost to the Company during this particular year was $385,063.64. Apportioning the operating expenses between the interstate business and the intrastate business according to the amount of each, the amount of operating expenses allocated to the interstate business would be $264,846.77 and that allocated to the intrastate would be $120,216.87. Affiant says that the allocation of the operating expenses to the intrastate business, according to the amount of gross receipts therefrom, is conservative, but if there is any difference between the cost of doing an interstate and intrastate business, it would be found, in affiant's opinion, that on an average the cost of doing the intrastate business would be greater. Affiant further says that his view in this respect is emphasized by the fact that the intrastate express rates generally, (and this is true in Mississippi)
65 as applied to certain commodities, are lower than similar interstate rates on the same commodities.

Affiant further shows that the total net income which the Southeastern Express Company had from all of its business interstate and intrastate for the twelve months ending April 30th 1922, was

$4,130.00 and that the net income from the intrastate business was only $1,289.39.

Affiant says that if the Southeastern Express Company be required to pay a privilege tax on the basis of Six (6.00) Dollars per mile on all first class railroad trackage and of Three $3.00 Dollars per mile on all second and third class railroads over which it operates in Mississippi, according to the classification of railroads made by the Mississippi Railroad Commission in the year 1921, such tax will amount to $3,706.32, and that in consequence its net earnings for the year in question upon the intrastate business would be less than the amount of the privilege tax and that the deficit would have to be made out of the Express Company's interstate earnings.

Affiant makes this affidavit to be used upon the hearing for injunction pendente lite in the above styled case and at such other hearings as the same may be relevent and admissible.

A. T. PERRY.

Sworn to and subscribed before me this 20 day of June, 1922.

KENDRICK L. SCOTT,
Notary Public.

Indorsed: Filed June 24, 1922.

66 Mississippi Railroad Commission, Regular Term, August, 1920.

Mississippi Railroad Commission.

Jackson, Miss.,
Tuesday, August 3rd, 1920.

Be it remembered that the Honorable Railroad Commission of the State of Mississippi met in regular session in their offices in the State Capitol Building, Jackson, Miss., Tuesday Aug. 3rd, 1920. Present and presiding Hon. W. B. Wilson, Commissioner, Hon. C. M. Morgan, Commissioner, Hon. George R. Edwards, President, being absent, but will be present at the afternoon session.

The Commission adjourned to meet again Wednesday morning, August 4th, 1920, at 10 o'clock A. M.

Wednesday Morning,
August 4th, 1920—10 o'clock a. m.

The Commission met pursuant to adjournment, present same as yesterday afternoon.

Under Section 3856 of the Code of 1906, as amended, the Railroad Commission of this state makes the following classification and fixed the amount per mile for privilege taxes to be paid *be* the various railroad companies doing business in this State for the fiscal year 1920-1921, as fixed by the Mississippi Railroad Commission.

67 It is further ordered that the classification made for 1920 and 1921, be made the same as for 1919 and 1920.

I. C. R. R.:

Name of railroad.	Class.	Per mile.
Main Line in Levee District	1	20.00
Main Line outside Levee Dis.	1	45.00
C. A. & N. and Ala. & Miss. Branch Lines	2	25.00
Meridian, Brookhaven & Natchez, & Brookhaven & Monticello Branches	3	10.00
Batesville & Southwestern, in Levee District	3	7.50
Batesville & Southwestern, outside Levee District	3	10.00
Y. & M. V. R. R.:		
Main Line in Levee District	1	20.00
Main Line outside levee district	1	45.00
The following named branch lines, to-?wit:		
Lake Cormant, Gwin-Asylum, Lambert via Ruleville, and Clarksdale to Swan Lake, in Levee District	2	15.00
Outside Levee District	2	25.00
Gwin to Durant, Parsons to Grenada, In Levee District	2	15.00
Outside the levee district	2	25.00
Matson to Lombardy Branch in levee district	2	15.00
Y. & M. V. R. R. (Cont'd):		
The following named branch lines to wit:		
Rosedale to Dockery, Moore's to Lamont, etc., Hampton to Glen Allen and Silver City to Kelso; In Levee District	3	$7.50
Outside Levee District	3	10.00
Natchez District	2	25.00
Helena & Charleston Dist. in Levee District	3	7.50
Outside Levee District	3	10.00
Woodville District	3	10.00
68 Helm & Northwestern, Minter City Southern & Western, Sunflower & Eastern and Leland S. W.	3	7.50
Mobile & Ohio R. R.: Main Line	1	45.00
Mobile & Ohio R. R.: All Branch Lines	3	10.00
Southern Ry. Co.:		
Memphis & Charleston	1	45.00
Alabama Great Southern	1	45.00
All Branch lines of Delta Southern, In Levee District	3	7.50
All Branch Lines of Delta Southern outside Levee District	3	10.00
N. O. & N. E. Division	1	45.00

Name of railroad.	Class.	Per mile.
So. Ry. Co. in Miss.:		
Main Line in Levee Dstrict	2	15.00
Main Line outside Levy District	2	25.00
All Branch lines in the Levee Dist	3	7.50
All Branch lines outside Levee Dist	3	10.00
Alabama & Vicksburg Railway Co	1	45.00
Louisville & Nashville R. R	1	45.00
Kansas City, Memphis & Birmingham (Frisco)	1	45.00
" " " " "		
(Branch Lines)	3	10.00
Gulf & Ship Island R. R	1	45.00
" " " " " Branches	3	10.00
Gulf Mobile & Northern R. R. Main Line Branches	3	10.00
Mississippi Central R. R. Main Line and Logging Road	3	10.00
Fernwood & Gulf R. R	3	10.00
Liberty-White R. R	3	10.00
Natchez, Columbia & Mobile R R	3	10.00
Natchez & Southern Ry	3	10.00
Pascagoula, Moss Point, Northern R. R	3	10.00
69 Alabama & Mississippi R. R	3	10.00
Chicora & Northwestern R. R	3	10.00
Meridian & Memphis R. R	3	10.00
Mississippi Eastern R. R	3	10.00
Sardis & Delta R. R	3	10.00
De Kalb & Western R. R	3	10.00
Pearl River Valley R. R	3	10.00
Oak Grove & Georgetown R. R	4	2.50
Kosciusko & Southeastern R. R	3	10.00
Mississippi & Western R. R	3	10.00
Jackson & Eastern R. R	3	10.00
Memphis & Lake View R. R	3	10.00
Gulfport, Mississippi Coast Traction Co	3	10.00

Ordered this August 4th, 1920.

I hereby certify that the foregoing is a true and correct copy of an order passed by the Mississippi Railroad Commission on the 4th day of August, 1920, relating to classification for privilege taxes of all railroads doing business in the State, and is taken from Minute Book 7, pages 317, 321, 322, 328, 329, 330, and 331 of the records of this office and of which I am proper custodian.

Witness my hand and seal this the 21st day of June, 1922.

J. W. WILLIAMS,
Secretary.

Indorsed: Filed June 24, 1922.

70 Mississippi Railroad Commission, Regular Term, August, 1921.

Jackson, Miss.,
Tuesday, August 2nd, 1921.

Be it remembered that the Railroad Commission of the State of Mississippi met in regular session in their office in the State Capitol Building, Tuesday August 2nd, 1921. Present and presiding Hon. George R. Edwards, President, Hon. W. B. Wilson, Commissioner, Hon. C. M. Morgan, Commissioner and James Galcern, Secretary.

Ordered that the Commission do now adjourn to meet again tomorrow morning at 9 o'clock.

Wednesday, August 3rd, 1921.

The Commission met pursuant to adjournment, present and presiding Hon. George R. Edwards, President Hon. W. B. Wilson, Commissioner, Hon. C. M. Morgan, Commissioner and James Galceran, Secretary.

Under Section 3856 of the Code of 1906, as amended, the Railroad Commission of this State makes the following classification and fix the amount per mile for privilege taxes to be paid by the various railroad companies doing business in this State for the fiscal year 1921 and 1922, as fixed by the Mississippi Railroad Commission.

71 It is further ordered that the Classification made for 1921 and 1922 be made the same as for 1920 and 1921.

Name of railroad.	Class.	Per mile.
I. C. R. R.:		
Main Line	1	45.00
C. A. & N. and Ala. & Miss. Branch Lines	2	25.00
Meridian, Brookhaven & Natchez and Brookhaven & Monticello Branches	3	10.00
Batesville & Southwestern	3	10.00
Y. & M. V. R. R.:		
Main Line	1	45.00
The following named Branch lines to-wit:		
Lake Cormant-Gwin-Asylum, Lambert via Ruleville, and Clarksville to Swan Lake	2	35.00
Gwin to Durant, Parsons to Grenada	2	25.00
Matson to Lombarty Branch	2	25.00
Rosedale to Dockery, Moore's to Lamont, etc. Hampton to Glenn Allen and Silver City to Kelso	3	10.00
Natchez District	2	25.00
Helena & Charleston District	3	10.00
Woodville District	3	10.00
Helm & Northwestern, Minter City Southern & Western Sunflower & Eastern & Leland Southwestern	3	10.00

Name of railroad.	Class.	Per mile.
Mobile & Ohio R. R.: Main Line	1	45.00
Mobile & Ohio R. R.: Branch Line	3	10.00
Southern Railway Company:		
Memphis & Charleston	1	45.00
Alabama Great Southern	1	45.00
All Branches of Delta Southern	3	10.00
No. & Ne. Division	1	45.00
Columbus & Greenville Railroad, Main Line	2	35.00
Columbus & Greenville Branch Line	3	10.00
Alabama & Vicksburg Railway Co.	1	45.00
Louisville & Nashville Railroad Co.	1	45.00
Kansas City, Memphis & Birmingham R. R. Main Line	1	45.00
72		
Kansas City Memphis & Birmingham R. R. Branch Line	3	10.00
Gulf & Ship Island Railroad Company, Main Line	1	45.00
" " " " " Branches	3	10.00
Gulf Mobile & Northern Railroad (Main Line & Branch)	3	10.00
Mississippi Central Railroad Main Line & Logging Road	3	10.00
Fernwood, Columbia & Gulf Railroad	3	10.00
Liberty-White Railroad	3	10.00
Natchez & Southern Railroad	3	10.00
Natchez, Columbia & Mobile Railroad	3	10.00
Alabama & Mississippi Railroad	3	10.00
Chicora & Northwestern Railroad	3	10.00
Meridian & Memphis Railroad	3	10.00
Mississippi Eastern Railroad	3	10.00
Sardis & Delta Railroad	3	10.00
De Kalb & Western Railroad	3	10.00
Pearl River Valley Railroad	3	10.00
Oak Grove & Georgetown Railroad	4	2.50
Kosciusko & Southwestern Railroad	3	10.00
Mississippi & Western Railroad	3	10.00
Jackson & Eastern Railway	3	10.00
Memphis & Lake View Railway	3	10.00
Gulfport, Mississippi Coast Traction Company	3	10.00

Ordered this August 3rd, 1921.

I hereby certify that the foregoing is a true and correct copy of an order passed by the Mississippi Railroad Commission on the 3rd day

of August 1921 relating to the classification for privilege taxes of all railroads doing business in the State and is taken from Minute Book 7, pages 453, 458, 459, 461, 462, and 463 of the records of this office and of which I am the proper custodian.

Witness *may* hand and seal this the 21st day of June 1921.

J. W. WILLIAMS,
Secretary.

Indorsed: Filed June 24, 1922.

73 *Corrected Order.*

#5263.

A. T. STOVALL, Receiver Columbus & Greenville R. R. Co.,
Ex Parte.

In re Privilege Taxes for 1921-1922.

This cause came on this day to be heard on application of A. T. Stovall, Receiver, Columbus & Greenville Railroad Company, for reduction in the assessment of Privilege Taxes for the fiscal year of 1921-1922. The Commission having carefully considered the statements made in the application, and the argument of counsel, and it appearing that the said Railroad has been unable to pay its ad valorem taxes for 1920-1921, and is barely meeting its operating expenses, is of the opinion that the petition should be granted. It is therefore ordered that the said Columbus & Greenville Railroad be made Class 3 instead of Class 2, and that the entire line, main line and branches, be assessed for privilege tax for the fiscal year of 1921-1922 at the rate of $10.00 per mile, as follows:

	Class.	Miles.	Priv. tax, per mile.	Total priv. tax.
Carroll County Main Line	3	18.95	$10.00	$189.50
Clay County Main Line	3	32.11	10.00	321.10
Leflore County Main Line	3	21.61	10.00	440.40
" " Talla. Branch	3	23.33	10.00	
Lowdes County Main Line	3	18.06	10.00	180.60
Montgomery County Main Line	3	25.02	10.00	250.20
Oktibbeha County Main Line	3	1.12	10.00	11.20
Sunflower County Main Line	3	19.25	10.00	192.50
Tallahatchie Co. Talla. Branch	3	11.04	10.00	110.40
Washington County Main Line	3	18.41	10.00	423.80
" " Deer Creek Br.	3	23.26	10.00	
" " Lealand Spur	3	0.71	10.00	
Webster County Main Line	3	23.70	10.00	237.00
				2,365.70

Ordered this October 4th, 1921.

74 By the COMMISSION:

This corrected order is written simply to correct a typographical error in the 9th line above where 11.04 miles was shown in Sunflower County, when it should have been in Tallahatchie County.

J. W. WILLIAMS, *Secty.*

I hereby certify that the attached is a true and correct copy of an order passed by the Mississippi Railroad Commission in regard to privilege taxes for the Columbus & Greenville Railroad Company for 1921-1922, as taken from Minute Book 7, pages 472 and 473 of the records of this office and of which I am the proper custodian.

Witness my hand and seal this June 21, 1922.

J. W. WILLIAMS,
Secretary.

Indorsed: Filed June 24, 1922.

75 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

v.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

The plaintiff, having filed its bill duly verified, and having presented to the Honorable Edwin R. Holmes, a judge of said court, its application for an interlocatory injunction, restraining the defendants, Stokes V. Robertson, as State Revenue Agent and individually and W. J. Miller, as State Auditor and individually, from enforcing and collecting, or attempting to enforce and collect, from plaintiff, the privilege tax exacted by Section 21 of Chapter 104 of the Laws of Mississippi of 1920, upon the grounds of the unconstitutionality of said statute as alleged in the bill, and from enforcing or collecting, or attempting to enforce and collect, from plaintiff any damages or penalties of any kind because of plaintiff's refusal to pay
76 said privilege tax; and said Judge, having called to his assistance, as required by statute, two other judges, to-wit: Circuit Judge N. P. Bryan, and District Judge H. D. Clayton, to hear and determine said application; and said application coming on to be heard before the said three judges on June 24, 1922, on bill, amendment to bill, answer of defendants and affidavits filed, come the parties, plaintiff and defendants, by attorneys, and also the Governor and the Attorney General of the State of Mississippi, and said three judges having heard and considered the same, and the argument of counsel: It is thereupon ordered and adjudged that the statute in question, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, and also that part of said statute exacting of express companies the privilege tax of $6.00 per mile on all first class railroad tracks in this state over which the business is operated, and $3.00 per mile on all second — third class railroad tracks in this

state over which the business is operated, is constitutional and is not in violation of either the Fourteenth Amendment to the Constitution of the United States or Article 1, Section 8, Clause 3, being the commerce clause of the Constitution of the United States, nor is said statute or said part thereof so vague, indefinite and uncertain as to be void and invalid for that cause.

It is thereupon further ordered and adjudged that plaintiff's
77 application for an interlocutory injunction be, and is, denied.

And thereupon plaintiff, by its attorneys, having this day presented its petition for an appeal from said order to the Supreme Court of the United States, with its assignment of errors, and praying for a supersedeas, and that the restraining order heretofore granted in this cause pending the hearing and determination of said application for an interlocutory injunction, may be restored, continued and extended pending said appeal in order that the status quo may be preserved and that irremediable injury may be prevented, it is further ordered that an appeal to the Supreme Court of the United States from said order and decree denying the interlocutory injunction, be and the same is hereby, allowed; that a certified transcript of the record, affidavits and proceedings be forthwith transmitted to the Supreme Court of the United States; and that upon the execution of an additional bond in the penalty $6,000, which has this day been done, said appeal shall operate as a supersedeas, and shall suspend until the final determination of said appeal the right of defendants to enforce against appellant the statute in question, and to that end it is ordered that the temporary restraining order heretofore granted herein be, and is, restored and extended and shall remain in full force and effect until the determination of said appeal.

Ordered, adjudged and decreed this 1st day of July, 1922.

E. R. HOLMES,
Judge.

78 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

Assignment of Errors.

Now comes the Appellant, Southeastern Express Company, by its Attorneys, and in connection with its petition for appeal says that in the record proceedings and decree aforesaid, manifest error has intervened to the prejudice of the Plaintiff, to-wit:

1. The court erred in holding that Section 21 of Chapter 104 of the laws of Mississippi of 1920 is constitutional and not in contravention of the provisions of the 14th amendment to the Constitution of the United States.

2. The court erred in holding that Said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is constitutional and not in
79 contravention of the Commerce Clause, being Article 1, Section 8, Clause 3, of the Constitution of the United States.

3. The Court erred in holding that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 was not unconstitutional and void because vague, uncertain and indefinite.

4. The court erred in holding that-that part of said Section 21, Chapter 104 of the laws of Mississippi of 1920 which exacts of Express Companies a privilege tax of $6.00 per mile on all first class railroad tracks in this State over which the business is operated, and $3.00 per mile on all second or third class railroad tracks in this State over which the business is operated, was not unconstitutional and void because vague, uncertain and indefinite.

5. The court erred in holding that said part of said statute exacting of Express Companies such graduated privilege tax was constitutional and was not in violation of the provisions of the 14th amendment to the Constitution of the United States, and was not in violation of the Commerce Clause, being Article 1, Section 8, Clause 3 of the Constitution of the United States.

6. The court erred in denying the application of Plaintiff for an interlocutory injunction.

7. The decree is contrary to law.

Wherefore the Appellant prays that said decree be reversed, and remanded with directions to said District Court for the Southern District of Mississippi to proceed in accordance with law.

SANDERS McDANIEL,
BOZEMAN & CAMERON,
Attorneys for Appellant.

Indorsed: Filed July 1, 1922.

80 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

To the Honorable Edwin R. Holmes, judge of said court:

The above named Plaintiff, feeling aggrieved by the decree rendered and entered in the above styled cause on the 1st day of July 1922, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herewith, and prays that its appeal be allowed, and that citations be issued as provided by law, and that a transcript of the record, proceedings and documents, upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington D. C., under the rules of such court in such cases made and provided.

81 Petitioner further prays that an order of supersedeas may be entered herein, and that the restraining order heretofore granted in this cause may be restored and extended and may be in force, in order that the status quo may be preserved, and to prevent irreparable loss and damage to plaintiff pending the finad disposition of this appeal, and that the amount of security may be fixed by the order allowing this appeal.

SANDERS McDANIEL,
BOZEMAN & CAMERON,
Attorneys for Plaintiff.

Indorsed: Filed July 1, 1922.

82 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTH-ERN EXPRESS COMPANY

v.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individuality.

Know all men by these presents that we, Southeastern Express Company, as principal, and United States Fidelity and Guaranty

Company, of Baltimore, Md., as surety, are held and firmly bound unto Stokes V. Robertson, as State Revenue Agent, and Individually, and W. J. Miller, as State Auditor, and individually, in the penal sum of ($6,000) Six Thousand Dollars, to be paid to said obligees, their successors or attorneys; to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Witness our signatures and seals this 1st day of July, 1922.

Whereas, in the above styled cause pending in the District Court of the United States for the Southern District of Mississippi,
83 a decree was rendered on the 1st day of July, 1922, denying the application of said South-ern Express Company for an interlocutory injunction against said obligees: and said Southeastern Express Company, having obtained an appeal from said order to the Supreme Court of the United States, with supersedeas, and restoring, extending and continuing in effect the temporary restraining order theretofore granted in said cause until the determination of said appeal;

Now the condition of the above obligation is such that if said Southeastern Express Company shall prosecute its appeal to effect, and will pay the amount of all damages and costs that may be awarded against it, if it shall fail to make its plea good, then the above obligation will be void; else to remain in full force and virture.

SOUTHEASTERN EXPRESS COMPANY,
By SANDERS & McDANIEL,
BOZENAU & CAMERON,
Its Attorneys.
UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MD.,
By RUCKS YERGER, JR.,
Attorney in Fact.

Approved July 1st, 1922.

By E. R. HOLMES,
Judge.

Indorsed: Filed July 1, 1922.

84 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTH-ERN EXPRESS COMPANY

v.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

UNITED STATES OF AMERICA, *ss:*

To Stokes V. Robertson, State Revenue Agent and individually, and W. J. Miller, State Auditor and individually, and to Hon. Lee M. Russell, Governor, and Frank Roberson, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from date of this citation, pursuant to an appeal duly allowed by the Honorable Edwin R. Holmes, Judge of the District Court of the United States for the Southern District of Mississippi, wherein said Southeastern Express Company is plaintiff in error and you are defendants in error, to show cause, if any, why the decree rendered against the plaintiff in error, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

85 Witness the Honorable Edwin R. Holmes, Judge of the District Court of the United States in and for the Southern District of Mississippi, this 1st day of July, 1922.

EDWIN R. HOLMES,
Judge.

Attest:
[SEAL.] JACK THOMPSON,
Clerk.

The following appear- on the back:

Executed the within writ by serving a true copy of same on Stokes V. Robertson, State Revenue Agent, and individually; W. J. Miller, as State Auditor and individually, Lee M. Russell, Governor, and Frank Roberson, Attorney General State of Mississippi at Jackson, Mississippi this the 7th, day of July 1922.

FLOYD LOPER,
U. S. Marshal.
J. H. WILLIAMS,
Deputy.

Jackson, Miss.,
July 7, 1922.

86 In the District Court of the United States for the Southern District of Mississippi.

In Equity.

No. 175.

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. MILLER, as State Auditor and Individually.

Præcipe for Record.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case, for the use of the Supreme Court of the United States, and to include the following:

Bill.
Amendment of Bill.
Application for hearing and for Restraining Order.
Decree on same.
Summons.
Notice of Application for Preliminary Injunction and return.
Bond for restraining order.
Application to Continue hearing.
Order on Same, Continuing Hearing to May 20, 1922.
Order Continuing Hearing to June 20, 1922.
Order Continuing Hearing to June 24, 1922.
Answer of Defendants.
Order of June 24th continuing writ 10 days.
Amendment to Answer.
Waiver of notice and appearance of Governor and Attorney General.
Narrative form of evidence.
Decree denying interlocutory injunction and granting
87 appeal.
Assignment of errors. Petition for Appeal.
Appeal Bond.
Citation and return.

SANDERS McDANIEL,
BOZEMAN & CAMERON,
Attorneys for Plaintiff in Error.

Notice of the foregoing præcipe is hereby accepted this 8th day of July, 1922.

ALEXANDER & ALEXANDER,
Attorneys for Defendant in Error.

Indorsed: Filed July 14, 1922.

88 In the District Court of the United States for the Southern District of Mississippi.

I, Jack Thompson, Clerk of the District Court of the United States for the Southern District of Mississippi do hereby certify that the foregoing 87 pages contains a true and correct transcript of the original record in the case of Southeastern Express Company vs. Stokes V. Robertson, State Revenue Agent et al. as the same appears of record in my office at Jackson, Miss.

Witness my hand and seal of said court hereunto affixed at Jackson in said District this July 17, 1922.

[Seal of the U. S. District Court, Southern District of Mississippi.]

JACK THOMPSON,
Clerk U. S. District Court, Southern District of Mississippi.

Endorsed on cover: File No. 29,078. S. Mississippi D. C. U. S. Term No. 528. Southeastern Express Company, appellant, vs. Stokes V. Robertson, State revenue agent, &c.; W. J. Miller, State auditor, &c., et al. Filed August 5th, 1922. File No. 29,078.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

I, Jack Thompson, Clerk of the District Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the original record in the case of Southeastern Express Company vs. Stokes V. Robertson, State Revenue Agent, et al., as the same appears of record in my office at Jackson, Miss.

Witness my hand and seal of said court hereunto affixed at Jackson, in said District, this 26 day of January, 1923.

Jack Thompson, Clerk U. S. District Court, Southern District of Mississippi. [Seal of the U. S. District Court, Southern District of Mississippi.]

(Copy)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 175. In Equity

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, State Revenue Agent, etc.; W. J. MILLER, State Auditor, etc., et al.

PETITION OF SOUTHEASTERN EXPRESS CO.—Filed Nov. 25, 1922

To the Honorable Nathan P. Bryan, Henry D. Clayton, and Edwin R. Holmes:

Now comes the Southeastern Express Company, appellant herein through undersigned counsel, and shows that heretofore a restraining order was granted to it in this cause on its application and that thereafter its application as plaintiff for an interlocutory injunction was referred by the Honorable Edwin R. Holmes, United States Judge for the Southern District of Mississippi, to a specific tribunal composed of the Honorable Nathan P. Bryan, United States Circuit Judge for the Fifth Judicial Circuit, Honorable Henry D. Clayton, United States District Judge for the Northern and Middle District of Alabama, and the Honorable Edwin R. Holmes, United States District Judge for the Southern District of Mississippi, and after due notice said application for a temporary injunction against the defendants, came on to be heard on the 24th day of June, 1922, before said special tribunal. That on July 1st, 1922, there was handed down in said proceeding an order worded and signed as follows:

"In the District Court of the United States for the Southern District of Mississippi

In Equity. No. 175

SOUTHEASTERN EXPRESS COMPANY

vs.

STOKES V. ROBERTSON, as State Revenue Agent and Individually, and W. J. Miller, as State Auditor and Individually.

The plaintiff having filed its bill duly verified and having presented to the Honorable Edwin R. Holmes a judge of said Court its application for an interlocutory injunction, restraining the defendants, Stokes V. Robertson, as State Revenue Agent and individually, and W. J. Miller as State Auditor and individually, from enforcing and collecting or attempting to enforce and collect, from plaintiff, the privileges tax exacted by Section 21 of Chapter 104 of the Laws of Mississippi of 1920, upon the grounds of the unconstitutionality of said statute as alleged in the bill, and from enforcing or collecting, or attempting to enforce and collect, from plaintiff, any damages or penalties of any kind because of plaintiff's refusal to pay said privilege tax; and said judge having called to his assistance, as required by statute, two other judges, to-wit: Circuit Judge N. P. Bryan and District Judge H. D. Clayton, to hear and determine said application; and said application coming on to be heard before the said three judges on June 24, 1922, on bill, amendment to bill, answer of defendants and affidavits filed, come the parties, plaintiff and defendants, by attorneys and also the Governor and the Attorney General of the State of Mississippi, and said three judges having heard and considered the same, and the arguments of counsel: It is thereupon ordered and adjudged that the statute in question, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, and also that part of said statute exacting of express companies the privilege tax of $6.00 per mile on all first class railroad tracks in this state over which the business is operated, and $3.00 per mile on all second — third class railroad tracks in this state over which the business is operated, is constitutional and is not in violation of either the Fourteenth Amendment to the Constitution of the United States or Article 1, Section 8, Clause 3, being the Commerce clause of the Constitution of the United States, nor is said statute or said part thereof so vague, indefinite and uncertain as to be void and invalid for that cause.

"It is thereupon further ordered and adjudged that plaintiff's application for an interlocutory injunction be and is denied. And thereupon plaintiff by its attorneys, having this day presented its petition for an appeal from said order to the Supreme Court of the United States, with its assignment of errors, and praying for a supersedeas, and that the restaining order heretofore granted in this cause pending the hearing and determination of said application for an

nterlocutory injunction, may be restored, continued and extended, ending said appeal in order that the status quo may be preserved nd that irremediable injury may be prevented, it is further ordered hat an appeal to the Supreme Court of the United States from said rder and decree denying the interlocutory injunction, be and the ame is hereby allowed; that a certified transcript of the record, ffidavits and proceedings be forthwith transmitted to the Supreme ourt of the United States; and that upon the execution of an addiional bond in the penalty of $6,000.00, which has this day been done, aid appeal shall operate as a supersedeas, and shall suspend until he final determination of said appeal the right of defendants to enorce against appellant the statute in question, and to that end it is rdered that the temporary restraining order heretofore granted erein be and is restored and extended and shall remain in full orce and effect until the determination of said appeal.

Ordered, adjudged and decreed this 1st day of July, 1922."

E. R. Holmes, Judge."

That on the same date, to-wit: July 1, 1922, petitioner presented n these proceedings its application for an appeal to the Supreme ourt of the United States for a supersedeas, for a stay order mainaining the status quo and such other and further orders as might e necessary in the premises and for general relief.

That since the above order was granted, the case of Cumberland Telephone & Telegraph Company, Plaintiff, vs. Louisiana Public Service Commission et al., Defendants, No. 650, October Term, 1922, has come before the Supreme Court of the United States, wherein it was ruled, among other things:

"Compliance with the statute (meaning Sec. 266 of the Judicial Code) requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting, followed by a formal order, tested as they direct. Notice of application for the injunction to opposing counsel should be required except in extraordinary circumstances. We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the motion to set it aside as void and made without jurisdiction. * * *

"This Court had occasion to consider the purport and significance of Section 17 of the Act of June 18, 1910, embodied in Section 266 in Ex parte Metropolitan Water Company of West Virginia, 220 U. S. 539, and there held that after a District Judge had granted a preliminary restraining order in such a case as provided, the same judge could not set aside his own order and such act by him was without jurisdiction. This Court therefore, issued a mandamus directing him to annul the order of vacation."

Petitioner now sets forth that either (*a*) the order granted by District Judge Holmes on July 1, 1922, is void because made without jurisdiction for the reason that a district judge alone is without jurisdiction to pass upon an application for a preliminary injunction or to set aside a temporary restraining order granted by him pending

an application for an interlocutory injunction in such cases, in which case the original temporary restraining order granted by District Judge Holmes upon the appellant's application for a preliminary injunction on April 27, 1922, and continued in effect by his orders of May 3, 1922, May 20, 1922 and June 20, 1922, and still in effect when the case was taken under advisement by the three judges on June 24, 1922, is now in full force and effect; or (*b*) the order so granted, being the act of the three judges, operates as a supersedeas, continues the status quo and suspends the right of the appellees to enforce against appellant the statute in question pending the final determination of the appeal herein taken to the Supreme Court of the United States.

Petitioner avers that a stay order maintaining the status pending appeal, is essential to shield it from irreparable injury because:

(1) Under Section 73 of Chapter 104 of the Laws of Mississippi of 1920, amending Section 3901 of the Code of 1906, a penalty is assessed for failure to pay the tax and procure a license during the month in which it is due and it is made the mandatory duty of the taxing authorities of the State of Mississippi to collect the penalty in the event of default, and to endorse across the face of the license issued, the words "Collected as damages"; and it has been held by the Attorney General of the State of Mississippi that no officer of the State is given discretion to waive the penalty;

(2) In the event petitioner should pay the license tax assessed against it under Section 21 of Chapter 104 of the Laws of Mississippi of 1920 under protest, and bring suit against the State to recover the same back, the Mississippi Courts would doubtless hold such payment to have been made with full knowledge of the facts and therefore voluntary, and that such suit would not lie.

(3) Even should petitioner pay the license tax under protest and bring suit against the State of Mississippi, under Section 4800 of the Code of Mississippi of 1906 (Hemingway's Code, Section 3164) and even should the Mississippi courts decide that the license tax was unlawfully collected and give judgment against the State for the amount of the tax so paid, your petitioner would have no assurance of ever realizing anything upon the judgment for the reason that Section 3166 of Hemingway's Code provides that:

"A judgment or decree against the State shall not be satisfied except by an appropriation therefor by the Legislature, and an execution shall not be issued against the State."

Your petitioner submits that what is possible, and not what may be acually done under the law, is controlling in determining whether irreparable injury will be suffered by petitioner should the status quo not be maintained.

Petitioner now therefore in order to comply with the ruling of the Supreme Court of the United States in the Cumberland Telephone & Telegraph case hereinbefore referred to, and in accordance with the

provisions of Article 266 of the Judicial Code as amended, petitions for:

(1) An order by three judges passing on its application for a preliminary injunction and in case said order should deny said application or it should otherwise be necessary, petitions for the following relief:

(1) An order allowing it an appeal in this matter.

(2) An order allowing it a supersedeas in this matter

(3) A stay order maintaining the status quo, restoring, continuing and extending, pending said appeal, the restraining order heretofore issued in this matter in order that irremediable injury which would otherwise accrue to petitioner, may be prevented. The said order continuing in effect the restraining order and maintaining the status to be conditioned upon giving by appellant of a bond or bonds upon such terms and for such amounts as this Court may determine to be just and proper. The petitioner prays for such other and further orders as may be necessary in the premises and for general relief.

(*d*) That the three judges tribunal be again convoked and notice of this application be given to opposing counsel.

Sanders McDaniel, J. Blanc Monroe, H. L. Greene, and Bozeman & Cameron, Solicitors for Appellant.

[File endorsement omitted.]

In the District Court of the United States for the Jackson Division of the Southern District of Mississippi

[Title omitted]

Order to Show Cause, etc.—Filed Nov. 25, 1922

Whereas in the above cause, it has been made to appear from the Bill of Complaint herein filed that a writ of inju-ction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto, enjoining the defendant from the acts complained of and about to be committed; and the undersigned District Judge having heretofore, on motion of complainant on, to-wit: the 27th day of April, 1922, ordered defendant to appear before the said District Judge and also a Judge of the Circuit Court of the United States and another District Judge of the United States Court, sitting to hear the matter, and then and there to show cause, if any they have, why the preliminary injunction herein prayed for should not issue; and having granted a temporary restraining order, which was extended from time to time until the hearing and determination of complainant's application for such preliminary injunction;

And, whereas, on the 24th day of June, 1922, at Biloxi, Mississippi, the said application was heard after due notice to all parties by the Honorable Nathan P. Bryan, Circuit Judge, and Henry D. Clayton, District Judge, and the undersigned District Judge;

And, whereas, an order was made and entered thereafter on the first day of July, 1922, by the undersigned District Judge, of the findings of said special tribunal denying complainant's application for an interlocutory injunction, and granting complainant an appeal therefrom to the Supreme Court of the United States, with supersedeas, and restoring and extending the said temporary restraining order until the determination of said appeal;

And, whereas, a question has arisen as to whether or not the said order as made and signed complies with the ruling of the Supreme Court of the United States in the recent case of Cumberland Telephone & Telegraph Company, Plaintiff, vs. Louisiana Public Service Commission et als., Defendants, No. 650, October Term, 1922;

Now, therefore, on motion of said complainant, it is ordered that the defendants appear before the undersigned Judge, of the District Court of the United States for the Southern District of Mississippi, and the said Honorable Nathan P. Bryan, a Judge of the Circuit Court of the United States, and the said Honorable H. D. Clayton, another District Judge of the United States, or such other Circuit Judge and District Judge as may be available, at the City of New Orleans, in the State of Louisiana, on the first day of December, 1922, at ten o'clock A. M., then and there to show cause, if any they have, why the preliminary injunction herein prayed for should not issue, and if said preliminary injunction be denied, then why complainant should not have an order allowing it an appeal in this matter, and allowing it a supersedeas, and continuing in effect the restraining order heretofore issued in this matter in order that irremediable injury which would otherwise accrue to complainant, may be prevented, and in order that the status may be maintained, and why complainant should not have such further orders as may be necessary and proper in the premises, and for general relief.

It is further ordered that a copy of this order be served upon the defendants and also upon the Governor and Attorney General of the State of Mississippi.

It is further ordered that said temporary restraining order be extended and remain in force until the said hearing and final determination of this matter.

Ordered at chambers in Yazoo City, Mississippi, this 25th day of November, A. D., 1922.

E. R. Holmes, United States District Judge.

[File endorsement omitted.]

(Endorsed on back of this order as follows:)

I have this day executed the within order by delivering a true copy thereof to Alexander and Alexander, Attorneys of record for defend-

ant; a true copy to Honorable Lee M. Russell, Governor, and a true copy to Honorable Cassedy Holden, Assistant Attorney General of the State of Mississippi, respectively, the Honorable Frank Roberson, Attorney General being out of the State, and a true copy to W. J. Miller, Auditor.

This Nov. 25th, 1922.

J. C. Tyler, U. S. Marshal, By R. O. Edwards, Deputy U. S. Marshal.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[Title omitted]

ORDER DENYING APPLICATION FOR INTERLOCUTORY INJUNCTION, ETC.—Filed Dec. 2, 1922

This case came on this day for further consideration in the light of the decision of the Supreme Court of the United States in the matter of Cumberland Telephone & Telegraph Company, appellant, vs. Louisiana Public Service Commission et als., appellees, No. 650, October Term, 1922, both plaintiff and defendants being represented by their respective counsel, after due notice, the matter having been brought to the Court's attention by the petition of the Southeastern Express Company, plaintiff, filed November 25, 1922, and this Court having been convened pursuant to the order of the United States District Judge Holmes, dated November 25, 1922, and to notice given pursuant thereof of this hearing to all parties, including the Governor and the Attorney General of the State of Mississippi.

When the Court considering the pleadings and affidavits, including the petition and order just hereinabove referred to, for reasons orally assigned,

It is ordered, adjudged, and decreed that the statute in question, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, and also that part of said statute exacting of express companies the privilege tax of $6.00 per mile on first class railroad tracks in this State over which the business is operated, $3.00 per mile on all second and third class railroad tracks in this State over which the business is operated, is constitutional and is not in violation of either the Fourteenth Amendment of the Constitution of the United States, or Article 1, Section 8, Clause 3, being the Commerce Clause of the Constitution of the United States, nor is said statute, or said part thereof so vague, indefinite and uncertain as to be void and invalid for that cause.

It is further ordered, adjudged, and decreed that plaintiff's application for an interlocutory injunction be and the same is hereby denied.

And thereupon plaintiff, by its attorneys, having duly presented its petition for appeal from said order to the Supreme Court of the

United States, with its assignment of errors, and having prayed for a supersedeas and that the restraining order heretofore granted in this cause pending the hearing and determination of said application for an interlocutory injunction may be restored, continued and extended pending said appeal in order that the status quo may be preserved, and that irremediable injury may be prevented.

It is ordered that an appeal to the Supreme Court of the United States from said order and decree denying the interlocutory injunction be, and the same is hereby allowed; that a certified transcript of the record, affidavits and proceedings herein be forthwith transmitted to the Supreme Court of the United States to the extent that same has not heretofore been so transmitted; and that upon the execution of an additional bond in the penalty of Twelve Thousand ($12,000.00) Dollars, approved by the United States Judge for the Southern District of Mississippi, or by the Clerk of his said Court, said appeal shall operate as a supersedeas and shall suspend until the final determination of said appeal the right of defendants to enforce against appellant the statute in question, and to that end, it is ordered that the temporary restraining order heretofore granted herein be and is restored and extended and shall remain in full force and effect until the determination of said appeal.

Ordered, adjudged, and decreed, this first day of December 1922.

Nathan P. Bryan, U. S. Circuit Judge. H. D. Clayton, U. S. Dist. Judge of the Middle and Northern Dist. of Alabama. E. R. Holmes, U. S. District Judge, Southern District of Mississippi.

[File endorsement omitted.]

Order denying application for interlocutory injunction and granting appeal and continuing restraining order. * * *

In the District Court of the United States for the Southern District of Mississippi

[Title omitted]

Bond on Appeal—For $12,000 00/100; Approved Dec. 1, 1922, and Filed Dec. 2, 1922; Omitted in Printing

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In the District Court of the United States for the Southern District of Mississippi

[Title omitted]

Assignment of Errors—Filed Dec. 2, 1922

Now comes the appellant, Southeastern Express Company, by its attorneys, and in connection with its petition for appeal says that

in the record proceedings and decree aforesaid, manifest error has intervened to the prejudice of the plaintiff, to-wit:

1. The Court erred in holding that Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is constitutional and not in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

2. The Court erred in holding that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is constitutional and not in contravention of the Commerce Clause, being Article 1, Section 8, Clause 3 of the Constitution of the United States.

3. The Court erred in holding that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 was not unconstitutional and void because vague, uncertain and indefinite.

4. The Court erred in holding that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 was not unconstitutional and void, because, even as construed by the Court, it would make applicable to the appellant each year a classification of railroads different from the classification applied for said year to the railroads themselves, since the appellant Express Company is compelled to pay its taxes in May, the annual classification referred to by the Court is made in August and the railroads pay their taxes in December.

5. The Court erred in holding that that part of Section 21, Chapter 104 of the Laws of Mississippi of 1920 which exacts of express companies a privilege tax of $6.00 per mile in all first class railroad tracks in this State over which the business is operated, and $3.00 per mile on all second or third class railroad tracks in this State over which the business is operated, was not unconstitutional and void because vague, uncertain and indefinite.

6. The Court erred in holding that said part of said statute exacting of express companies such graduated privilege tax was constitutional and was not in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, and was not in violation of the Commerce Clause, being Article 1, Section 8, Clause 3 of the Constitution of the United States.

7. The Court erred in denying the application of the plaintiff for an interlocutory injunction.

8. The decree is contrary to law.

Wherefore, the appellant prays that said decree be reversed and remanded with directions to said District Court for the Southern District of Mississippi to proceed in accordance with law.

Sanders McDaniel, H. L. Greene, Bozeman & Cameron, J. Blanc Monroe, Attorneys for Appellant.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[Title omitted]

CITATION AND SERVICE—Filed Dec. 2, 1922

UNITED STATES OF AMERICA, *ss:*

To Stokes V. Robertson, State Revenue Agent and Individually, and W. JI. Miller, State Auditor and Individually, and to Honorable Lee M. Russell, Governor, and Frank Roberson, Attorney General, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date of this citation, pursuant to an appeal duly alllowed by the Honorable Nathan P. Bryan, United States Circuit Judge, Honorable H. D. Clayton, Judge of the District Court for the Northern and Middle District of Alabama, and Honorable Edwin R. Holmes, Judge of the District Court of the United States for the Southern District of Mississippi, wherein said Southeastern Express Company is appellant and you are appellees, to show cause, if any,, why the decree rendered against the appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan P. Bryan, United States Circuit Judge, Honorable H. D. Clayton, United States District Judge for the Northern District of Alabama, and Honorable Edwin R. Holmes, Judge of the District Court of the United States in and for the Southern District of Mississippi, this 1st day of December 1922.

Nathan P. Bryan. H. D. Clayton. E. R. Holmes.

[Filæ endorsement omitted.]

Serviice of the above citation on Stokes V. Robertson State Revenue Agent, and W. J. Miller, State Auditor, and Stokes v. Robertson and W. J. Miller individually, is hereby accepted this Dec. 1st, 1922.

Alexander & Alexander, Atty-. of Record.

(Endorsed on back as follows:)

Received the within writ at Jackson, Miss., on the 4th day of Dec., 1922, and executed the same by handing a true copy thereof to Frank Roberson, Atty. General, on the 4th day of Dec. 1922, and by handing a true copy thereof to Lee M. Russell, Governor, on the 13th day of Dec., 1922.

Jas. C. Tyler, U. S. Marshal, (By) J. H. Gearhart, Deputy.

Jackson, Miss., Dec. 13, 1922.

Clerk's Certificate

State of Mississippi,
Hinds County:

I, Jack Thompson, Clerk of the United States District Court for the Southern District of Mississippi, hereby certify that the foregoing 14 pages contain a transcript of the following documents in the case of Southeastern Express Co. vs. State Revenue Agent, No. 175 as same remains on file in my office:

Petition for Injunction.
Order on same.
Order Denying Injunction.
Bond for Restraining Order.
Assignment of Errors.
Citation and Return.

Witness my signature, this the 15th day of December, 1922.
Jack Thompson, Clerk. [Seal of United States District Court, Southern District of Mississippi.]

Endorsed on cover: File No. 29,391. S. Mississippi D. C. U. S. Term No. 216. Southeastern Express Company, appellant, vs. Stokes V. Robertson, State revenue agent, etc.; W. J. Miller, State auditor, etc., et al. Filed February 10th, 1923. File No. 29,391.

In the Supreme Court of the United States

SOUTHEASTERN EXPRESS COMPANY,
Appellant,

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC. ET. AL.
Appellees.

NUMBER 216.
OCTOBER TERM, 1923.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR SOUTHEASTERN EXPRESS COMPANY, APPELLANT.

SANDERS McDANIEL,
A. S. BOZEMAN,
H. L. GREENE,
Attorneys for Southeastern Express Company, Appellant.

INDEX.

CASES CITED.

In The Supreme Court of The United States.

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vs.

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Appellees.

NUMBER 216.
OCTOBER TERM, 1923.
Appeal from the District Court of the United States for the Southern District of Mississippi.

BRIEF FOR SOUTHEASTERN EXPRESS COMPANY, APPELLANT.

STATEMENT OF CASE.

Appellant, SOUTHEASTERN EXPRESS COMPANY, filed a bill of complaint in the United States District Court for the Southern District of Mississippi, seeking to have certain statutes of the State of Mississippi undertaking to impose what is termed a privilege tax upon express companies declared invalid, and to enjoin the collection of such privilege tax. Appellees were made parties defendant in the original bill, inasmuch as they were officials of the State of Mississippi charged with the enforcement of the taxing laws of that State, and with the collection from express companies of privilege taxes.

The privilege tax statute, the constitutionality of which was questioned, is embodied in Section 21 of Chapter 104 of the laws of Mississippi for 1920 (Hemingway's Code Supplement, 1921, Section 61512), as follows:

> "Express Companies—On each Express Company transporting freight or passengers from one point to another in this State $500.00, and $6.00 per mile on all first class railroad tracks in this State over which the business is operated, and $3.00 per mile on all second or third class railroad tracks in this State over which the business is operated."

Section 73 of Chapter 104 of the Laws of Mississippi of 1920 (Hemingway's Code Supplement, 1921, Section 6630) provides a penalty for the failure to comply with Section 21 of Chapter 104 above quoted, and is as follows:

> "Damages in case of failure to procure license—All persons, firms, partnerships or corporations liable for privilege taxes, who shall fail to procure the license therefor before beginning the business taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has theretofore paid a privilege tax, shall, in each or either such instance, be liable for double the amount of the tax, and it is hereby made the duty of the Tax Collector of the County in which such business is conducted to collect the amount, issue a separate license therefor, and to endorse across its face the words, 'Collected as Damages'."

It was alleged in the bill that Southeastern Express Company had begun business in the State of Mississippi on May 1st, 1921, and that having failed to pay the privilege tax sought to be exacted under Section 21 of Chapter 104 of the Laws of Mississippi of 1920 for the year beginning May 1st, 1921, and ending April 30th, 1922, a penalty in double the amount of such tax was assessed against it by appellee Robertson, as State Revenue Agent, and that suit at the time was pending in the State Courts of Mississippi the same having been brought by Robertson for the collection of the privilege tax as well as for the penalty assessed, such penalty or "damages" being the amount of the privilege tax assessed and sought to be levied. It was further alleged in the bill that the tax for

the second year during which Southeastern Express Company would do business in Mississippi was about to accrue and that unless the Express Company paid the tax for such second year, another penalty would be assessed against it, and that having no adequate remedy at law, resort to equity was necessary in order to insure against penalty or "damages" while the validity of the privilege tax was being contested.

It was alleged in the bill that the privilege tax statute (with the exception of that portion which required the payment of the arbitrary amount of five hundred dollars) was unconstitutional in that so much of the Statute as provided that express companies should pay six dollars ($6.00) per mile on all first class railroad tracks in Mississippi over which the business might be operated, and three dollars ($3.00) per mile on all second or third class railroad tracks in the State over which the business should be operated, was void for uncertainty for the reason that the statute levying the tax did not define what are first, second or third classes of railroad tracks, and that no provision was made for classifying railroad tracks over which express companies might do business into first, second or third classes for the purpose of levying privilege taxes upon Express Companies; further, that no provision was made for the according of notice and hearing to express companies for the ascertainment of what are first, second or third class railroad tracks.

It was also alleged in the bill that while Section 45 of Chapter 104 of the Laws of Mississippi for 1920, amending Sections 1 and 2 of Chapter 102 of the Laws of Mississippi for 1912 (Hemingway's Code, Section 6573) as follows:

> "Railroads.—That Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on Railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on Railroads, such Railroads are divided into four classes— first, second, third and narrow gauge, and privilege taxes

levied on them as follows: On each railroad of the first class, per mile $45.00; on each railroad of the second class, per mile $25.00; on each railroad of the third class, per mile $10.00; on each narrow gauge railroad, per mile $2.50.

The Railroad Commission shall annually, on or before the first Monday in August, classify the several railroads according to their charters and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the 1st day of December, and the finding of the said Railroad Commission shall be certified to the Auditor of Public Accounts and the Chancery Clerk of the County through which each road, or roads run, and any person, or persons, natural or artificial, who shall exercise any of the privileges taxed herein without first paying the tax and procuring the tax or license as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law."

provided for a classification of railroads into certain classes by the Mississippi Railroad Commission for the purpose of levying privilege taxes upon railroads, that such section was entirely separate and unconnected with Section 21, and that in consequence, the classification of railroads therein provided when made by the Railroad Commission, could not be availed of for the purpose of levying privilege taxes upon express companies.

The further alternative was alleged that even if Sections 21 and 45 could be engrafted each upon the other still there would exist no provision for notice to express companies and opportunity for them to be heard when the classification of railroads under Section 45 was made, and that in consequence, the law even upon the hypothesis that Sections 21 and 45 could be coupled together, denies to express companies due process of law; and further, that the law unwarrantedly

discriminates against express companies in not according them the right to be heard when the classification of railroads should be made under Section 45, although railroads were accorded a hearing and that as a result, express companies, including complainant, were denied the equal protection of the laws.

It was further alleged in the bill that the Fourteenth Amendment to the Constitution of the United States was contravened in another way. Section 45 of Chapter 104 provides that the classification of railroads for the purpose of levying privilege taxes upon them should be made annually on or before the first Monday in August, and that the privilege tax thereon should be paid on or before the first day of the following December. In other words, that for railroads, the taxing year was from December 1st following the August classification of railroads, to December 1st, in the following year, with the result that railroads for any succeeding tax year would obtain the benefit of a classification preceding such tax year; while as to appellant, Southeastern Express Company, the privilege tax would be assessed from May 1st, 1922, upon a classification made in August, 1921, thus bringing about a situation under which the Express Company would be compelled to pay upon the basis of the 1921 classification from May 1st, 1922, until April 30th, 1923, without regard to the classification of railroads which might be made by the Railroad Commission in August, 1922, to the end that appellant would pay the tax certainly for several months after August 1922, upon the basis of the classification made in 1921, and without any regard to the classification made in 1922, and it was charged in the Bill that this maladjustment would create an inequality in the administration of the privilege tax law, calculated to unjustly discriminate against appellant.

Upon presentation of the Bill to the Judge of the United

States District Court for the Southern District of Mississippi, an order was passed by him (pages 14 and 15 of Printed Record) temporarily restraining upon the terms therein mentioned the defendants and each of them, and their agents and attorneys "from collecting or undertaking to collect or enforce from complainant any privilege tax, damages or penalties for the year beginning May 1st, 1922," such restraining order to remain in effect until the date set for a hearing on the application for interlocutory injunction, (May 6, 1922) which interlocutory hearing was to be in accordance with Section 266 of the Judicial Code. The bond required as a condition to the issuance of the restraining order was duly made by appellant. The date set for the hearing on application for preliminary injunction was extended by orders from time to time, and the restraining order originally granted was kept in effect by appropriate orders, the last order of extension made by the District Judge being as follows: (Page 20, Printed Record):

> "And that the temporary restraining order and writ heretofore made and issued herein remain in force and effect and be extended until the hearing and determination of said application for preliminary injunction."

The three judge court was finally assembled and heard the application for interlocutory injunction on June 24th, 1922, and upon this hearing, an order was passed on July 1st, 1922, (Printed Record, pages 39 and 40) denying such application for interlocutory injunction. An appeal at the same time was allowed to this Court, and by express order, a stay was granted to preserve the *statu quo* pending appeal, and the temporary restraining order theretofore granted was restored, extended and ordered to remain in effect.

The appeal allowed as aforesaid was duly perfected, and the authenticated transcript of the record thereof was duly transmitted to this Court, the same having been docketed

here as Number 528, October Term, 1922. It will be observed that the order of July 1st, 1922, denying appellants application for interlocutory injunction was signed only by Honorable E. R. Holmes, District Judge, not having been signed by Circuit Judge, Honorable N. P. Bryan and District Judge, Honorable H. D. Clayton, who sat with Judge Holmes at the hearing, and it is to be noted that it does not appear from the record that such order was made after an announcement in open court by the three judges sitting; but, upon the other hand, it is deducible that no such announcement was made, inasmuch as the hearing as recited in Judge Holmes' order was on June 24th, 1922, and the order in question was not signed until July 1st, 1922.

Subsequent to the first appeal hereinbefore referred to as Number 528, October Term, 1922, this Court, on November 20th, 1922, made its decision in the case of–

> *Cumberland Telephone & Telegraph Co.* vs. *Louisiana Public Service Commission, et. al. 260 U. S. 212; 43 Supreme Court 75,*

in which the practice under Section 266 of the Judicial Code governing the hearing, grant or denial of applications for interlocutory injunctions in cases where the constitutionality of the State Statutes were under attack, came under consideration and review. The following pronouncement was made by the Court in its opinion:

> "Compliance with the statute requires the assent of the three judges given after the application is made, evidenced by their signatures, or an announcement in open court, with three judges sitting followed by a formal order tested as they direct."

It became evident after the decision in the Cumberland Telephone case that the order made and entered by Judge Holmes on July 1st, 1922, was a nullity, and that in consequence, the appeal taken from such order was nugatory and unavailing.

Upon application made by appellant (Printed Record, Pages 47-51 inclusive) Judge Holmes reassembled the three judge court and appellant's application for interlocutory injunction was taken under consideration by the judges *de novo*, and on December 1st, 1922, an order was passed signed by the three judges sitting, denying the application for interlocutory injunction, and allowing an appeal to this Court (Printed Record, pages 53, 54.)

This second appeal was then perfected and the case brought here for review.

While perhaps not strictly germane to the statement of this case, it is nevertheless proper to call attention to the fact that since this appeal was taken, the Supreme Court of Mississippi in a cognate case, Robertson, State Revenue Agent, vs. Southeastern Express Company, 94 Southern, page 210, has held adversely to certain of the contentions made by the appellant in the bill, and, of course, insofar as the decision of the Supreme Court of Mississippi constitutes a construction of the Mississippi statutes, such decision will be treated as conclusive and binding.

The jurisdiction of the District Court was based upon diversity of citizenship as well as upon the ground that the controversies are under the constitution and laws of the United States.

SPECIFICATIONS OF ERROR RELIED ON.

1.

Appellant contends that the statute of the State of Mississippi quoted in the statement of the case, which imposes the privilege tax upon it as an express company, denies to it due process of law,—

(a) Because such statute is so vague, uncertain and indefinite as to be void.

(b) Because the Statute as to so much of the privilege tax as is assessed against it at $6.00 per mile on all first class railroad tracks over which its business is operated in the State of Mississippi, and $3.00 per mile on all second and third class railroad tracks over which the business is operated, provides no measure or standard by which it can be determined as to what are first class railroad tracks for the doing of an express business, or as to what are second and third class railroad tracks for the doing of an express business. And no provision of law is elsewhere found by which it can be ascertained as to what are first class railroad tracks and second and third class railroad tracks in connection with an express business.

(c) Although the Supreme Court of Mississippi has held that "First, second and third class railroads" referred to in Section 21, Chapter 104, Laws of 1920, (Hemingway's Code Supplement 1921, Section 6512) are those required by Section 45, Chapter 104, Laws of 1920, (Hemingway's Code Supplement 1921, Section 6573) to be classified by the Railroad Commission, and although the effect of said holding may be to engraft upon said Section 21, Chapter 104, Laws of 1920, Section 45 of the same Chapter and laws, even assuming that the connection between the section imposing a privilege tax upon express companies with the section of law classifying railroads into four classes for the purpose of levying privilege taxes on railroads be thus conclusively established by the decision of the Supreme Court of Mississippi so as "not to be open to question" in this Court, there still is found neither measure nor standard for classifying railroad trackage for the purpose of taxing the express business operated over such trackage, inasmuch as the classification of railroads under Section 45, Chapter 104, etc. is for the sole purpose "*of levying a privilege tax on railroads*".

(d) Because even upon the assumption that the clas-

sification of railroads into classes provided for in Section 45, Chapter 104, etc., despite the fact that such classification is "for the purpose of levying a privilege tax on railroads" can be extended to the end that the classifications made under Section 45 will govern the imposition of privilege taxes upon express companies under Section 21, there is no provision in the law even when supplemented in this way for notice and hearing to express companies when the classification of railroads is made by the Mississippi Railroad Commission.

2.

Appellant contends that it is denied the equal protection of the law:

(a) Because when the classification of railroads provided for under Section 45, Chapter 104 of the Laws of Mississippi of 1920 is made by the Railroad Commission, railroads are accorded the right to be heard upon the facts and criteria governing such classification; while, upon the other hand, express companies are not accorded a hearing when the classification is made, and are not allowed to present facts either as to the value of particular trackage relative to an express business, or as to such value according to the criteria prescribed by Section 45 which govern the classification for the purpose of levying privilege taxes upon railroads.

(b) Because railroads are enabled to pay the privilege tax for the whole of any given year upon basis of the classification made by the Railroad Commission prior to the beginning of any particular tax year; while appellant, on the other hand, for any given tax year, is compelled to pay upon an assessment made for a previous year for a considerably longer period of time than are railroads, and appellant is thus illegally discriminated against in that another class of taxpayers are given the benefit of the annual classification of railroads made by the Railroad Commission for a longer period of time than is appellant.

APPELLANT WAS JUSTIFIED IN RESORTING TO EQUITY, AND THE EQUITY JURISDICTION ATTACHES IN THE CASE.

The bill was brought to enjoin appellees from enforcing the provisions of an alleged unconstitutional law, it being the duty of the Auditor of the State of Mississippi to collect privilege taxes and the duty of the State Revenue Agent, in the event of failure to pay, to assess both the privilege tax and an amount equal thereto as damages, it further being the duty of the State Revenue Agent to bring suit for the privilege tax as well as for the damages assessed.

Appellant therefore could not refuse to pay the tax when it became due without running the risk of having a penalty equal to the amount of such tax assessed against it. Appellant, therefore, had no adequate remedy at law, and in order to escape a possible distraint at the instance of the State Revenue Agent for the amount of the privilege tax and penalty, or in any event a suit at law for both the amount of the tax and the penalty or damages, it was necessary that it should resort to equity before the privilege tax for 1922 became due. It had before it the fact as alleged in the bill that when it failed to pay the privilege tax upon entering business in May, 1921, preceding, the State Revenue Agent not only assessed the privilege tax against it, but also a penalty in an amount equal to such privilege tax, and brought suit against it both for the amount of the tax and the penalty. In such circumstances, the rule is well settled that resort to equity can be had.

By Section 4738 of the Code of Mississippi for 1906 (Hemingway's Code, Section 7056) it is expressly made the duty of the State Revenue Agent "to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons,

for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures, * * * * * * * * * ."

It is true that there is contained in the Mississippi Law, Section 2949, of the Code of Mississippi for 1906 (Hemingway's Code, Section 5284) the following provision:

> "If any person, firm or corporation has paid, or shall hereafter pay to the Auditor of Public Accounts or to any tax collector of the State, through error or otherwise, any privilege tax for which such person, firm or corporation was not liable, or has so paid for any privilege license an amount exceeding the sum for which such person, firm or corporation is liable, that upon proof of such erroneous payment or overpayment has been paid into the State Treasury, he shall, with the advice and approval of the Governor and Attorney-General, issue to such person, firm or corporation, his warrant for his or their assigns, his warrant upon the State Treasury for an amount equal to such erroneous payment or overpayment, and the same shall be paid by the State Treasury from any funds appropriated for such purpose."

Manifestly, this provision of the law furnishes no certain remedy for the collection back by the tax-payer of an illegal tax paid. The matter in the first place is left discretionary with the Auditor of Public Accounts and he can only act and make restitution "with the advice and approval of the Governor and Attorney-General."

Another provision of the Mississippi law, Section 4800 of the Code of Mississippi of 1906 (Hemingway's Code, Section 3164) is as follows:

> "Any person having a claim against the State of Mississippi, after demand made of the auditor of public accounts therefor, and his refusal to issue a warrant on the treasurer in payment of such claim may, where it is not otherwise provided, bring suit therefor against the State, in the court having juris-

diction of the subject matter which holds its sessions at the seat of government; and if there be no such court at the seat of government, such suit may be instituted in such court in the county in which the seat of government may be."

If, perchance, it should be asserted that the last quoted section furnishes a complete and adequate remedy at law, the contention to this effect disappears when the following provision of the Mississippi Law is taken into consideration:

Section 4802 of the Code of Mississippi (Hemingway's Code, Section 3166) is as follows:

> "Payment of judgment or decree against the State. A judgment or decree against the state shall not be satisfied except by an appropriation therefor by the Legislature and an execution shall not be issued against the State."

Thus, it will be seen that even if a voluntary payment of the tax had been made, suit brought for its recovery back and judgment obtained in the Court, the tax-payer still would be at the mercy of the Legislature before he could collect the judgment. And would be left to conjecture and speculation as to what the Legislature would do. In the meantime, however, the penalty would have to be incurred and the tax-payer would be under the necessity of contesting at law the validity of the tax under the threat and danger of being penalized for so doing.

Manifestly, the remedy at law was entirely inadequate.

In the case of *Bank of Kentucky vs. Stone, et al., 88 Fed. 383, 390, 391,* Mr. Circuit Judge Taft, with whom was sitting Mr. Circuit Justice Harlan, and Mr. Circuit Judge Lurton, in dealing with a case that was practically on all-fours with the case at bar, rendered the decision which, it is respectfully submitted, is the law governing such a case today. The fourth head-note of this case provides as follows:

> "The right to defend against an action at law to collect taxes on the ground of the invalidity of the statute under which they were assessed, is not an adequate remedy when the statute, like the Kentucky Revenue Law of November 11th, 1892, provides that the party failing to pay the tax within a specified time shall be subject to a penalty, and to a fine for each day of delay, to be enforced by indictment or civil action."

This case was affirmed by the Supreme Court of the United States without opinion.

Stone vs. Bank of Kentucky, 174 U. S. 799.

In *Pacific Express Company vs. Seibert, 44 Fed. 810* (affirmed in 142 U. S., 339), the first head-note is as follows:

> "Where a suit is not essential to the collection of a tax, and a penalty is imposed for delay in paying the tax, and no action lies to recover back the tax if paid, equity has jurisdiction to determine the legality of the tax, and enjoins its collection if illegal."

In the opinion, the Court speaking through Mr. Justice Caldwell, on page 315, says:

> "Equity abhors penalties and holds the remedy at law inadequate when the assertion of the alleged right at law will be, or may be attended by the imposition of heavy penalties and forfeitures. And upon this ground, and because an action will not lie under the laws of Missouri to recover back the tax if paid, equity has jurisdiction in this case."

In this connection see also:

Smyth vs. Ames, 169 U. S. 466, 517, 518.

To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity.

Boyce vs. Grundy, 3 Pet. 210, 215;

Sullivan vs. Railroad Company, 94 U. S., 806, 811.

That a litigant is entitled to go into a court of equity for the purpose of determining the validity of a statute imposing a burden upon him, where the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts, is clearly established by the cases of:

Ex parte Young, 209 U. S. 123.

Wadley Southern Railway Co. vs. Georgia, 235 U. S. 651, 662,

and other similar cases.

In Dawson, Attorney General, vs. Kentucky Distilleries and Warehouse Company, 255 U. S. 288, the Court in the opinion on page 296, speaking through Mr. Justice Brandeis, said:

> "It is well settled that if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. 'Davis vs. Wakelee, 156 U. S. 680, 688'."

See also:

Louisville Trust Company vs. Stone, 107 Fed. 305, 309.

In Davis vs. Wakelee, 156 U. S. 680, the Court on page 688 said:

> "Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

Even conceding that complainant could pay the privilege taxes assessed against it under Section 21, Chapter 104 of the Laws of Mississippi of 1920, under protest, and could sue the State of Mississippi to recover them back, the possibility of realizing upon such a judgment, if obtainable, is so

vague and doubtful as to give a court of equity jurisdiction in this case.

It is clearly established by the cases that mandamus will not lie to control the action of an officer vested with discretion or powers which, in their nature, call for the exercise of judgment in their performance.

City of Atlanta vs. Wright, 119 Ga. 207, 211, 212; 45 S. E. 994.

In 18 R. C. L. page 124, paragraph 38, the author said:

> "It is a well recognized rule that where the performance of an official duty or act involves the exercise of judgment or discretion, the officer cannot ordinarily be controlled with respect to the particular action he will take in the matter; he can only be directed to act, leaving the matter as to what particular action he will take to his determination."

In support of the above quotation, the author cites many State and Federal cases, one of which is

United States vs. Lamont, 155 U. S. 303.

Mr. Justice White on page 308 of the opinion said:

> "It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary.
>
> This doctrine was clearly and fully set forth by Chief Justice Marshall in Marbury vs. Madison, 1 Cranch, 137, and has since been many times reasserted by this Court."

The Court there cites many decisions which it is unnecessary to record here.

In Central of Georgia Railroad Company vs. McClendon, 157 Fed. 961, Judge Newman also discusses this matter very thoroughly.

See also:

Cummings vs. National Bank, 101 U. S. 153.

BRIEF OF THE ARGUMENT.

Character of Tax.

Section 21, Chapter 104 of the Laws of Mississippi of 1920 is quoted in full in the statement heretofore made. Even a casual examination of Section 21 makes it apparent that the Legislature of the State of Mississippi in enacting the law therein contained exerted its power to tax, and that Section 21 which seeks to exact privilege taxes of express companies is not a mere police regulation.

It is apparent that a portion of the contemplated tax is levied in a lump sum, to-wit: $500.00, and to that extent represents a more or less arbitrary legislative pre-adjudgment; but it is further apparent that the balance of the tax is sought to be fixed according to some measure, the endeavor being to graduate the balance of such tax, to-wit: $6.00 per mile on all first class railroad tracks over which an express business is operated, and $3.00 per mile on all second and third class railroad tracks according to some scale, the tax per mile varying radically according as to whether the business be done over what the statute denominates as "first class railroad tracks" or whether it be done over "second or third class railroad tracks."

The decision of the Supreme Court of Mississippi in the case of—

New Orleans, M. & C. Railroad Company vs. State, 110 Mississippi, 290; 70 Southern 355,

construes the whole Chapter of the Laws of Mississippi which, at the time such decision was rendered, was Chapter 102 of the Laws of 1912, and which corresponds to and with certain amendments is the same as Section 104, of the Laws of 1920, (in which Section 21 appears) and which imposes privilege taxes upon various occupations. In the cited case, the Court in construing that particular Section of the Chapter, says:

"The whole act and the chapter in which it appears in our Code shows a general scheme for imposing an excise or privilege tax on various occupations, businesses and professions within the confines of our state, *to raise revenues in support of our state government*, and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the State." (Italics ours.)

The fact that the statute is designed to raise revenue furnishes conclusive test that in enacting Section 21, the Mississippi Legislature was acting under its taxing powers, and that Section 21 was passed for the purpose of levying a tax and was not intended as a police regulation.

The exaction of a license tax as a condition to the doing of any particular business is a tax on the occupation; and a tax on the occupation of doing business is in essence a tax on the business.

Leloup vs. Port of Mobile, 127 U. S. 640; 645; Note 60 L. R. A., 691.

Postal Telegraph-Cable Company vs. Adams (Miss. case) 14 Southern 36; affirmed in 155 U. S. 688.

It is further apparent that the portion of the tax to be levied at $6.00 per mile on first class railroad trackage and at $3.00 on second and third class railroad trackage was intended to have a direct relation to the value of the privilege exercised. Evidently the Legislature considered that the operation of an express business over first class railroad tracks was of substantially greater value than the operation of an express business over second and third class railroad tracks; and it is further fairly deducible that it was in the Legislative mind, in making the difference, to do so according to the variations in the express business done over a variety of railroad trackage. In other words, it must have been the legislative purpose to adjust and measure the tax accord-

ing to the express business. It would be inconceivable that the Legislature imposed double the tax per mile in one instance over what it would be in another unless the business done over a particular mileage of railroad trackage when compared with that done over some other mileage justified the variance in the amount of the tax. It would further seem to be inconceivable that in taxing express companies according to certain classes of railroad trackage and in varying the tax according to classes of trackage, the Legislature could have had in mind any other standard or measure than that furnished by the business of the express company and the value of the privilege.

We assert, therefore, that the tax prescribed by Section 21, Chapter 104 of the Laws of Mississippi of 1920 represents a tax upon the business of express companies, and that with the exception of $500.00, such tax is measured according to the amount or value of the business, and that to this end, the unfixed and uncertain portions of the tax are to be made fixed and certain by a classification of railroad trackage over which express companies operate according to the value of the operations to express companies over particular classes of railroad trackage.

Section 21 is to be found in a Chapter of the Laws of the State of Mississippi which taxes "Privileges." A portion of this tax, insofar as express companies are concerned, is manifestly measured according to the value of the privileges exercised. The value of the privilege exercised by an express company must be according to the amount or profitableness of the business done, and, therefore, the business done by the express company is the sole criterion for ascertaining the value of the privilege and of measuring the tax accordingly.

THE LAW OF MISSISSIPPI WHICH SEEKS TO IMPOSE PRIVILEGE TAXES UPON EXPRESS COMPANIES IS VOID FOR UNCERTAINTY AND IS, THEREFORE, UNENFORCEABLE.

Although Section 21, Chapter 104 of the Laws of Mississippi of 1920 stands apart from Section 45 of the same Chapter, the Supreme Court of Mississippi has held

> (*Robertson V. Southeastern Express Company 94 So. 210*),

that the first, second and third class railroads referred to in Section 21 are those required by Section 45 to be classified by the Railroad Commission. The construction of the Mississippi Statute by the highest Court of that State is accepted as binding here, and in this view of the matter, the gap between Section 21 and Section 45 is bridged, and Section 45 in consequence is engrafted upon Section 21. Our statement that Section 45 has been engrafted upon Section 21 by the decision of the Supreme Court of Mississippi is measured. Section 45 does not itself state what are first class railroads and what are second and third class railroads (or, using the verbiage of Section 21, what are first class railroad tracks and what are second or third class railroad tracks.) Section 45 provides that the Railroad Commission shall classify railroads into certain classes. In other words, Section 45 provides the machinery for a classification of railroads, and if the ultimate result of the classification by the Railroad Commission of Mississippi is to be binding upon express companies, the method by which the result is obtained must inevitably be considered as a part of the taxing machinery under which privilege taxes are exacted of express companies. The result of the process by which railroads are classified under Section 45 cannot be applied to Express Companies, but the process by which the result is obtained

must be considered in determining the validity of the privilege tax when applied to these companies.

As we have urged, there was a reason in the legislative mind when the privilege tax to be imposed on Express Companies was fixed at $6.00 per mile on first class railroad tracks, and at only $3.00 per mile where the operations were over second and third class railroad tracks.

When therefore, the Supreme Court of Mississippi adopts the classification of railroads made under Section 45 as the basis for levying the privilege tax upon express companies, the terms of Section 45 thus joined to Section 21 must be taken into account in testing the constitutionality of the law. It is submitted that under the construction announced by the Supreme Court of Mississippi the law is involved in as much uncertainty as it was prior to such construction. The duty which we conceive is devolved upon *this Court* is to determine whether under the construction made by the Supreme Court of Mississippi there is evolved a reasonably certain law for the levying of privilege taxes upon express companies.

Section 45 expressly provides that the classification of railroads therein delegated to the Railroad Commission is for the purpose of levying privilege taxes upon railroads. Furthermore, the statute provides the factors which shall enter into such classification, to-wit: the gross earnings of railroads and their charter privileges. Manifestly, these factors or criteria cannot be held with any degree of certainty to apply to express companies. Cognizance must be taken of the fact that the volume of freight business over particular railroad trackage would not measure the volume of express business over the same trackage. Necessarily, it must be assumed and can properly be assumed that in certain sections freight traffic might be heavy and express traffic light, and the reverse of this is also true. The same

could be said with regard to passenger business done by railroads, and while the privilege tax by Section 21 is laid on express companies transporting freight or passengers from one point to another, as a matter of fact, express companies do not transport passengers and the freight which they do transport is a different character of freight from that transported by railroads.

That the express business is separate and distinct from the railroad business is recognized by the Legislature of Mississippi in that a separation of the two has been made for taxing purposes. That a common carrier by express is separate and distinct from a common carrier by railroad is recognized by the authorities generally.

> *In Re: Express Companies, 1 I. C. R. 677, 682, 683;*
>
> *Wells Fargo & Company vs. Taylor, 254 U. S. 175.*

In the case of–

> *Pacific Express Company vs. Seibert, 142 U. S., 339,*

the Court draws a clear distinction between express companies and railroad companies for purposes of taxation. In the opinion by Mr. Justice Lamar, on pages 353, 354, after directing attention to the distinction between express companies, upon the one hand, and railroad and steamboat companies upon the other, in connection with the particular law involved, it is said, on page 354:

> "This distinction clearly places express companies defined by this Act in a separate class from companies owning their own means of transportation They do not do business under the same conditions, or under similar circumstances. *In the nature of things, and irrespective of the definitive legislation in*

question, they belong to different classes." (Italics ours.)

In the case of–

Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, 83 Miss. 320; 36 So. 144, 145,

it was distinctly held by the Supreme Court of Mississippi that the classification of railroads to be made for the purpose of levying privilege taxes on railroads was to be made with regard to charter exemption claims as well as to gross earnings, and it is incontestably true that privileges and exemptions which might be given to railroads under their charters could not and would not avail for the benefit of express companies which by contracts might do an express business over railroads.

The law of Mississippi, therefore, even under the construction placed upon it by the Supreme Court of that State is still lacking in certainty inasmuch as it does not provide for a classification of railroads for the purpose of taxing express companies. There is still a lack of machinery when express companies are included within the provisions of Section 45, and the law remains uncertain and arbitrary insofar as express companies are concerned in that it fails to provide any measure of the amount or value of the express business done over any particular railroad trackage to the end that such measure or value might constitute a standard by which railroad trackage could be classified for the purpose of taxing express companies.

In State vs. Cook (Ind. App.) 59 N. E. 489, the Statute being considered by the Court prohibited the loading of more than two thousand (2,000) pounds on a narrow tired wagon or more than two thousand five hundred (2,500) pounds on a broad tired wagon; and such statute was held void because it fixed no standard for determining what was a narrow or

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what was a broad tire. The Court on page 490 of the Reporter said:

> "Where terms of a statute are so uncertain as to their meaning that the Court cannot discern with reasonable certainty what is intended, it will pronounce the enactment void;" citing:
>
> *Blacks Interp. Laws, Par. 36;*
>
> *Cheezem vs. State, 2 Ind., 149;*
>
> *King vs. State 2 Ind., 523.*

In the case of State vs. Partlow, 91 N. C., 550, the Court said:

> "Whatever may be the views and purposes of those who procure the enactment of a statute the Legislature contemplates that its intention should be certain from its words embodied in it, and Courts are not at liberty to accept the understanding of an individual as to the Legislative intent."

Mr. Justice Nelson, in the case of Powers vs. Barney, Fed. Case No. 11, 361, (5 Blatchf 202) said:

> "Duties are not imposed upon a citizen upon vague or doubtful interpretations."

This language was cited and approved in–

United States vs. Watts, Federal Case No. 16,653;

Vicksburg Railroad Company vs. State, 62 Miss. 105;

Mayor vs. Hartridge, 8 Ga., 23;

Lewis' Sutherland Statutory Construction, Vol. 2, page 999, par. 537;

Rice vs. United States, 53 Federal, 912;

Hartranft vs. Wiegmann, 121 U. S., 609, 616.

In the case of United States vs. Isham, 17 Wallace 496, the Court, in its opinion on page 504, pronounces this dictum:

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in Girr v. Scudds, 'a tax cannot be imposed without clear and express words for that purpose'."

In the case of Powers vs. Barney, supra, a decision from the Circuit Court of the United States for the Southern District of Georgia, the second headnote is as follows:

> "In cases of serious ambiguity in the language of a tariff act, or doubtful classification of articles, the construction must be in favor of the importer, *as duties are never imposed upon the citizen upon vague or doubtful interpretation.*" (Italics ours.)

In *United States vs. Wigglesworth,* Federal Case No. 16690, (2 Story, 369), Judge Story, speaking for the Court, says:

> "It is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provisions by implication beyond the clear import of the language used, *or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analysis.*
>
> *In every case, therefore, of doubt, such statutes are construed more strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed beyond what the statutes expressly and clearly import.*
>
> *Revenue statutes are not in just sense either remedial laws or laws founded upon any permanent, public policy, and, therefore, are not to be liberally construed.*" (Italics ours.)

The foregoing quotation from Judge Story's decision was cited with approval in the following cases:

United States vs. Athens Armory, Federal Case, No. 14,473;

Devereaux vs. City of Brownsville, 29 Federal 753;

Memphis vs. Bing (Tenn.) *30 S. W. 746;*
In Re: Enston's Estate (N. Y.) *21 N. E., 88;*
Green vs. Holway, (Mass.) *101 Mass. 248;*
Schilling vs. State (Ind.) *18 N. E. 682;*
State vs. Pullman Company (Wis.) *23 N. W., 873;*

Benziger vs. United States, 192 U. S. 38,55.

The uniform principle of law is that a statute must be construed according to the terms thereof, and that doubts of its validity should be resolved in favor of the tax payer.

Lewis' Sutherland Statutory Construction 2nd Ed. Volume 2, page 998,

quoting from the English case of Gurr vs. Scudd, 11 Exc. 190, 192, and also from a comparatively late case before the House of Lords (*Partington vs. Attorney General*, L. R. 4 H. L. Case 122.) The quotation from the House of Lords case is as follows:

> "The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, *where you can simply adhere to the words of the statute.*" (Italics ours.)

See also–

Hilburn vs. St. Paul, M. & M. Railway Co., 23 Mont. 229; 58 Pac. 551, 555;

Treat vs. White, 181 U. S. 264, 267;

Board of Supervisors vs. Tallant, 96 Va. 723; 32 S. E. 479;

Turnpike Railroad Co. vs. Thomas (Ky.)3 S. W. 907;

Combined Saw & Planer Company et al vs. Flournoy, 88 Va., 1029; 14 S. E. 976

We assume, as we have endeavored to point out, that unquestionably in the fixation of a privilege tax upon express companies upon the basis of the mileage of first, second and third class railroad tracks over which express business might be operated, the Legislature had in mind a classification according to the value of the express business upon particular railroad trackage. If the premise is sound, then the amount of the tax must depend upon the ascertainment of facts with respect to the express companies, and the classification of railroads must be with respect to the express business done over them.

Not only does Section 45 fail to provide any method for making the classification with regard to the business of express companies for the purpose of levying privilege taxes upon express companies, but it expressly provides that the classification shall be for the purpose of levying privilege taxes upon railroads.

Therefore, the tax here is laid not according to any certain, definite and precise statutory terms, but under statutes which are lacking in precision, certainty and definiteness.

DUE PROCESS OF LAW IS NOT AFFORDED TO APPELLANT BY THE PRIVILEGE TAX STATUTE OF MISSISSIPPI.

As we have argued, in holding that Section 45 of Chapter 104 of the Acts of the Legislature of Mississippi of 1920 provides for the classification of railroads for the purpose of taxing express companiesu nder Section 21 of Chapter 104, the State Supreme Court inevitably combined the two Sections, and, in consequence, the terms of Section 45 must be resorted to and tested for a determination of the legal adequacy, efficiency and validity of the privilege tax law when applied to express companies. It is to be noted that no provision has been made for notice to express companies, or opportunity for them to be heard in classifying railroads either (a) as to the amount of the express business or the value of the privilege to express companies over particular railroad trackage; and (b) as to the facts which are required to be taken into consideration by Section 45 in classifying railroads for the purpose of assessing privilege taxes against railroads.

In other words, we make two distinct contentions: one being that express companies ought to be afforded notice and opportunity to be heard as to the value of the *express business itself* over various railroad trackage, and that a classification of railroads for levying privilege taxes under Section 21 should be made according to the express business; the other being that in any event, even if classification of railroads should be confined to the measures and standards fixed by Section 45, inasmuch as express companies are to be taxed according to the classification, they should have the opportunity to be heard when railroads are being classified and the facts governing such classification under Section 45 are being passed upon by the Railroad Commission.

In its final analysis, the claim of appellees is in substance

that when the Railroad Commission of the State under Section 45 makes a classification of railroads in the way provided in such section, such classification becomes absolute and binding upon express companies in the assessment of privilege taxes against them, without regard to the fact that such classification of railroads is made without notice to express companies, and without opportunity being given them to be heard.

This view would seem to disregard the fact that with the exception of the sum of $500.00, the privilege tax is graduated according to the classes of railroads over which an express business may be done.

The decision of the Supreme Court of the State of Mississippi in the case of—

New Orleans M. & C. Railroad Co. vs. State, 110 Miss. 290; 70 So. 355,

is relied upon by that Court to sustain its construction that the privilege tax provided by Section 21 does not violate the Commerce Clause of the Federal Constitution. In the cited case, the Supreme Court of Mississippi while reiterating the holding made in a former case to the effect that the tax levied under Sections one and two of Chapter 102 of the Laws of Mississippi of 1912 (which sections and Chapter were amended by Section 45 of Chapter 104 of the Laws of Mississippi of 1920, the present law) was not an ad valorem tax, but was a privilege tax proper, at the same time states (70 So. 357):

> "While the act itself levies the tax and provides that standard gauge railroads outside of levee districts shall be divided into three classes, it yet remains that the Railroad Commission must classify before the levy is complete.
>
> 'If it be conceded that the act levies a tax, it still remains true that something more was necessary, to

wit: the classification referred to '*Railroad Co. vs. Adams*, 83 Miss. 320, 36 South. 145.'

* * * * *

It may be that the directions given the Commission by Chapter 102, Laws of 1912, for classifying railroads for privilege tax purposes, are very general and, to some extent, indefinite. They are, however, given a general rule to go by, viz: to classify the several railroads according to their charter and the gross earnings of each."

And further, in the opinion in the particular case, (70 So. 358) the Supreme Court of Mississippi says:

"The direction to the Railroad Commission to consider the gross earnings of the railroads is only a part of the general directions given. They are also directed to consider the charter of the several railroad companies. We are not called upon in this case to define every element that should properly be considered by the Railroad Commission in determining the particular class to which any road should be assigned, but we do say that the act gives evidence of a general rule whereby the Commission should consider the charter rights and privileges of each company. ***It was the purpose of the Legislature to graduate the taxes according to the business and rights enjoyed.*** In determining the class the Legislature thought it material for the Commission to look to the general charter of the company and the extent of the rights and franchises therein conferred upon the company. Is the company in any particular case one chartered to operate a grand trunk railroad or a line of a few miles? Is it one equipped for and capable of doing a large business? In other words, a charter and charter privileges give evidence of the volume of business prepared to be done, and actually being done by any railroad in Mississippi, and to some extent define its prosperity. (Italics ours.)

To quote further, on page 359 of the case in the 70th

Southern, we find the Court, after discussing the question as to whether the tax is imposed upon gross earnings intrastate as well as interstate, making a dictum which is very illuminating here—as follows:

> "Any interpretation of the statute must take into account the fact that the Legislature in giving these directions is not itself directly imposing a tax upon the earnings of the railroad, but is investing an inferior tribunal or governmental functionary with the general authority to classify all railroads in five classes. *This tribunal stands between the parties with authority to fix the classification and thereby equitably adjust the rights of all parties. In fixing the classification any railroad has the right to be heard, to offer evidence, reserve objections to any adverse ruling, and to have the proceedings and judgment of this tribunal reviewed by the circuit Court through the proper writ of certiorari.*" (Italics ours.)

Further, the Supreme Court of Mississippi in the case of—

> *Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, 85 Miss. 772; 38 So. 348,*

has declared that the Railroad Commission in classifying railroads according to charter exemptions and gross earnings acted judicially. The Court, on page 351, 38 Sou., said with regard to the classification of railroads for privilege taxes:

> "It was the duty of the Commission to classify them according to charter exemptions (from state supervision) and gross earnings. The Commission classified them as railroads of the third class, and of the first, second, and third classes, respectively, saying nothing as to charter exemptions. This classification, in each case, was a judicial act. Everything was concluded by it which was comprehended or involved in it. It amounted to an adjudication that these roads were not liable for the years in question to

the privilege tax of $10 per mile as railroads claiming exemption from state supervision. This judgment is final and conclusive, and cannot now be brought in question. *Railroad Company vs. Adams*, 77 Miss. 778; 25 South 355; *Railroad Company vs.-Adams*, 81 Miss. 105, 32 South. 937."

It is established, therefore, by the decisions of the Supreme Court of Mississippi:

First: That Railroads, when classified, have the right to be heard concerning the facts and elements pertaining to their classification; and

Second: That when the State Railroad Commission does classify railroads for the purpose of levying privilege taxes, the act of that body in doing so in each instance is a judicial act.

As to express companies, we, therefore, have a statute which enacts that privilege taxes shall be graduated and varied according to whether the business is operated over first class railroad trackage, or over second and third class railroad trackage. We further have the decision of the Supreme Court of Mississippi that the first, second and third class railroads referred to in Section 21 of Chapter 104 prescribing the privilege taxes to be paid by express companies are those classified by the Railroad Commission under Section 45 of Chapter 104. In view of this situation, why should not express companies be accorded notice and hearing when a classification of railroads is made under Section 45?

It would seem that express earnings and the value of the privilege growing out of the operation over certain classes of railroad trackage should be considered in classifying railroads for the purpose of levying privilege taxes on express companies. The legislative intent deduced from the fact that $6.00 per mile was to be assessed for the privilege of

operating over first class railroad trackage and $3.00 per mile for operating over second and third class railroad trackage, clearly, we think, shows that the earnings of express companies and the privileges enjoyed by them were to be reckoned in fixing the classification. This we believe to be the correct view and the meaning of the law.

If however, we are wrong as to this, what answer can there be to the contention that if express companies are to be taxed according to the classification of railroads made under Section 45 in taxing railroads, then express companies are entitled to a hearing when the classification of railroads is made by the Commission? Why should railroads be accorded a hearing when the classification is made, and other taxing subjects, (express companies) which are bound by the classification, be denied a hearing? Appellees planted their case upon the proposition that the classification of railroads by the State Commission was final and binding upon express companies, despite the fact that these companies were not given a hearing when the classification was made, and the Supreme Court of the State of Mississippi has upheld such contention of appellees.

We concede that privilege or occupation taxes are often represented by a fixed amount, and that in such cases no hearing either can or should be given the taxpayer, but we respectfully submit that where a privilege tax is graduated and levied according to classifications arrived at under the ascertainment of particular facts no such classification can be valid unless a tax-payer whose taxes are assessed under it is given a hearing; and we further respectfully insist that any law which provides for an assessment and levy of taxes under such a classification which fails to provide for a hearing to the tax-payer is in conflict with the Fourteenth Amendment to the Constitution of the United States.

The decision of this Court in—

Hager vs. Reclamation District No. 108, 111 U. S. 701,

is authority in supporting the general doctrine that license taxes can ordinarily be imposed upon occupation and business without requiring that a hearing be allowed to the persons subject thereto, and yet, in this very case the exception for which we contend is made by the Court.

In the opinion by Mr. Justice Field on page 709, it is said:

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as pole taxes, license taxes (*not dependent upon the extent of his business*), and generally, specific taxes on things, or persons, or occupations." (Italics ours.)

Here we have a statute in which the amount of the tax is manifestly dependent upon the extent of the business. Dependent upon the extent of what business? We believe that the extent of the express business was what the Legislature must have had in view, or else the tax sought to be levied would be in essence arbitrary and without regard to any reasonable standard or criterion.

But if it is to be measured by the extent of the business done by railroads and according to the charter provisions of railroads, an investigation of facts based upon evidence is required, and the proceeding in which classification is made is necessarily judicial as the Supreme Court of Mississippi has declared it to be; and in such case, notice and hearing to each tax-payer concerned is just as necessary as when a tax is levied upon property and the value of the property must be as certained, and particularly is this true when a large penalty is exacted upon a failure to pay the tax.

This Court in the case of—

Central of Georgia Railway Co. vs. Wright, 207 U. S., 127,

in the opinion on page 138 says:

> "Former adjudications in this Court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson v. New Orleans, 96 U. S. 97; Weyhauser v. Minnesota, 176 U. S. 550; Hager v. Reclamation District, 111 U. S. 701.*
>
> "In the late case of Security Trust & Safety Vault Company vs. The City of Lexington, 203 U. S. 323, decided at the last term of this Court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the tax-payer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the tax-payer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the state court gave the tax-payer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

It must be borne in mind that appellant is not afforded the opportunity to be heard regarding:

First: The absence of a classification according to its business; and

Second: To be heard as to the correctness of the classification made by the Commission of the railroads over which

it operates. Such classification was fixed and settled and could not be reviewed otherwise than by certiorari.

Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, supra, 38 So. 348.

New Orleans M. & C. Railroad Co. vs. State, supra, 70 So. 357,

in which latter case, it is held that the judgments of the Commission in classifying railroads for privilege tax purposes "are binding upon both the state authorities and the railroad companies assessed, unless, of course, an appeal is prosecuted in the method prescribed by statute," citing the case of

Railroad Co. vs. Adams, 85 Miss. 772, 38 So. 348, supra,

in which it is distinctly held that the remedy from an erroneous assessment of the Railroad Commission is by certiorari.

Therefore, under the decisions of the Supreme Court of Mississippi, unless an express company participated in a hearing before the Railroad Commission when railroads were classified under Section 45, Chapter 104, and unless it reviewed by certiorari the correctness of the classification, the doors of the Courts would be closed to it insofar as a review of the classification made might be concerned.

See also—

Western Union Telegraph Co. vs. Kennedy, 69 So. 674; 110 Miss. 73.

This leads us to say that the tax herein contested was assessed under a law which makes no provisions for express companies to be heard upon facts governing classification of railroads, under which classifications the privilege taxes which they are to pay become fixed and binding.

Appellees squarely take the position that it is not essential to due process of law that an opportunity to

express companies to be heard be given, and the Supreme Court of Mississippi holds that due process is not denied "by the classification of railroads without notice to express companies intending thereafter to transport or engage in transporting freight over them."

Without regard to what has been done under the law, if the requirement of the Fourteenth Amendment to the Constitution of the United States as to due process of law is not met, the statute is unconstitutional, and the tax, together with the penalty sued for, is consequently invalid.

"Constitutional validity of the law is to be tested not by what has been done under it, but by what may by its authority be done."

Violett's Heirs, et. al. vs. City Council of Alexandria (Supreme Court of Appeals of Virginia) 23 S. E. 913;

Stuart v. Palmer, 74 N. Y. 188;

Cole vs. Armour Fertilizer Works, 237 U. S. 413, 424, 425;

Security Trust Co. vs. Lexington, supra;

Roller vs. Holly, 176 U. S. 398, 409;

L. & N. Railroad Co. vs. Stock Yards Co. 212 U. S. 132, 144.

Particularly and especially is it necessary that a taxpayer shall be accorded a hearing in cases where facts must be considered and found in order to assess a tax where the failure to pay the tax assessed is accompanied by a severe penalty.

Manifestly inasmuch as a penalty follows a failure to pay the tax notice and hearing before such penalty is inflicted is absolutely necessary in order that due process of law be accorded.

Regal Drug Corporation vs. Waddell, Collector, 43 Supreme Court, 152;

O'Sullivan vs. Felix, 233 U. S. 318;

Central of Ga. Ry. Co. vs. Wright, supra;

Lipke vs. Lederer, Collector, 259 U. S. 557, 42 Supreme Court, 549.

THE EXACTION OF THE PRIVILEGE TAX WILL DENY TO APPELLANT EQUAL PROTECTION OF THE LAWS.

Under this branch of the case, we contend that the Fourteenth Amendment is violated in two particulars:

First: Because railroads under Section 45 of Chapter 104 of the Laws of Mississippi of 1920 are accorded the right to be heard upon the classification fixed by the Railroad Commission for the purpose of exacting privilege taxes of them, and this right is not accorded to express companies.

Second: Because appellant does not receive equally with other tax-payers the benefit which may accrue from the annual classification of railroads under Section 45 of Chapter 104 of the Laws of Mississippi of 1920 by the Railroad Commission of Mississippi.

In the case of—

New Orleans M. & C. Railroad Co. vs. State, 70 So. 355,

the dictum made by the Supreme Court of Mississippi, on page 359 already quoted and here repeated as follows:

> "In fixing the classification, any railroad has the right to be heard, to offer evidence, reserve objections to any adverse ruling, and to have the proceedings and judgment of this tribunal reviewed by the circuit court through the proper writ of certiorari,"

is a clear recognition of the right of railroads to be heard when classified by the Railroad Commission for the purpose of levying privilege taxes against railroads. In other words, the Supreme Court of Mississippi considers that due process of law requires that hearing shall be accorded to railroads when classification of them is made. Upon the other hand, the Supreme Court of Mississippi has held that so far as express companies are concerned, notice and hearing to them is not required in order that due process of law be accorded. It is settled that this Court is the final arbiter upon questions raised under the Constitution of the United States, and insofar as these questions are concerned, the decision of the State Supreme Court is not conclusive.

Crew Levick Co. vs. Pennsylvania, 245 U. S. 292, 294.

This leads us to the contention that not only is the appellant denied due process of law in not being accorded a hearing when railroads are classified, but is also denied the equal protection of the law.

Let it be borne in mind that the classification of railroads provided for in Section 45 of Chapter 104, according to the decision of the Supreme Court of Mississippi in this case, is to be used not solely for the purpose of levying privilege taxes upon railroads, but also for levying privilege taxes upon express companies. We have argued that accepting the construction of the Supreme Court of Mississippi, there is uncertainty in the law, but we go further on this branch of the case and say that under this construction, one tax-payer whose privilege taxes are governed by the classification under Section 45, is allowed a hearing when the classification is made as a matter of right, and another is denied a hearing on such classification. No reason for this discrimination can be conceived. When Section 45 of Chapter 104 is engrafted upon Section 21 of the same Chapter, if the law in

such situation can be construed as meaning that the classification of railroads by the Railroad Commission is for the purpose of taxing express companies, then the system arbitrarily discriminates as between express companies and railroads. Appelles contend that the classification of railroads by the Railroad Commission under Section 45 is final and binding upon express companies although they are not allowed to be heard when the classification is made, and the Supreme Court of Mississippi has upheld such contention. This view of the law utterly disregards the graduated nature of the privilege tax prescribed by Section 21. It disregards the fact that under the plain terms of Section 21, the tax imposed upon express companies is double the amount where operations are over first class railroad tracks of that prescribed where operations are over second and third class railroad tracks. When this difference in the amount of the levy is made, it depends upon the character of the trackage; that is to say, as to whether or not the same is first class, upon the one hand, or second and third class upon the other, according to the classification of the Railroad Commission. It inevitably follows that express companies are entitled to be heard when the classification of railroad trackage is made. Its interest in the classification is relatively the same as that railroads have; and to accord the latter the right to be heard and to deny it to express companies, is to create a discrimination based upon no sound reason and which is necessarily arbitrary and unsustainable.

A study of Section 45 providing for the classification of railroads for the purpose of levying privilege taxes upon railroads makes it clear that the scheme of the law is to fix for railroads a privilege tax year, so to speak, beginning on or before the first day of December subsequent to the assessment made on or before August 1st, of the same year, and that so far as railroads are concerned, the taxing machinery

has been so adjusted that a railroad is classified in August of a particular year, and on the following December begins to pay upon the basis of such classification, and in the event the classification made in the subsequent August is favorable to a railroad in that the amount of its privilege taxes will be reduced thereunder, it will pay as privilege tax under a previous less favorable classification for only a short period of time.

Upon the other hand, appellant's tax year will be from May 1st of one year until May 1st of the subsequent year, and even though the classification in August following a payment by it of the privilege tax in May may be such as that the privilege taxes would be reduced, appellant cannot obtain the benefit of such reduction until after May 1st of the year following the one in which the favorable classification is made by the Commission.

The State of Mississippi, therefore, has not provided the machinery by which express companies and railroads will be dealt with equally and impartially, and it is appellant's contention, therefore, that in this way it is denied the equal protection of the laws.

We admit that there exists "no iron-bound rule of equality" in taxation under the Fourteenth Amendment, but we do insist that distinctions made in taxation through classification must, in order to be permissible, be based upon some real ground. This Court in the case of—

> *Southern Railway Company vs. Greene, 216 U. S. 400, 417,*

has in an illuminating way stated the limitation upon states in making classification for the purpose of taxation. In the opinion on page 417, it is said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some

> real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; *and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.* (Italics ours.)

What we insist upon is nothing more than the right which this Court has held that all persons are guaranteed under the Fourteenth Amendment, that is, that all "shall be treated alike under like circumstances, both in the privilege conferred and in the limitations imposed." But where distinctions have been made in the respects which we have endeavored to point out in this branch of the argument, it would appear that appellant has been subjected "to an arbitrary exercise of the powers of government." In two glaring particulars it has not been accorded the privileges granted by the State of Mississippi to others, as we contend, under like circumstances and conditions. That discrimination has been made is unquestionable, and that such discrimination was without legal justification and was based upon no reasonable ground we believe to be also unquestionable.

In passing upon the Federal questions which we have endeavored to present, the facts of this case are, of course, to be determinative.

> *Carson vs. Curtiss, 234 U. S. 103, 106;*
>
> *Merchants National Bank of Richmond vs. Richmond, 256 U. S. 635, 638.*

What this appellant claims is the application of the principle forcibly announced by this Court in the case of-

> *Atchison, Topeka & Santa Fe Railway Co. vs. Vosburg, 238 U. S. 56.*

In the opinion on page 59, the Court, after stating that the legislation under consideration was properly to be regarded as a police regulation, pronounces this dictum:

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, *and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation.*" (Italics ours.)

See also—

Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150, 155, 165;

Cotting vs. Kansas City Stock Yards Co. and The State of Kansas, 183 U. S. 79;

Connolly vs. Union Sewer Pipe Co. 184 U. S. 540.

Respectfully submitted,

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Attorneys for Southeastern Express Company, Appellant.

FILED
MAR 17 1924
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

Number 214

OCTOBER TERM, 1923.

SOUTHEASTERN EXPRESS COMPANY,
Appellant,

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC., ET AL.

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC., ET AL., ON THEIR MOTION TO DISMISS.

[redacted]
Attorneys for Appellees.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

Number 216

OCTOBER TERM, 1923.

Appeal from the District Court of the United States for the Southern District of Mississippi.

SOUTHEASTERN EXPRESS COMPANY,
Appellant,

VS.

STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC., ET AL.
Appellees.

BRIEF FOR STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC. ET AL., OR THEIR SUCCESSORS IN OFFICE.

R. H. THOMPSON,
ALEXANDER & ALEXANDER,
Attorneys for Appellee.

STATEMENT.

It is deemed necessary to add very little to the statement of the case contained in the brief of counsel for appellant.

The identical questions involved in this case are presented in the case of Southeastern Express Company

vs. Stokes V. Robertson, et al, previously submitted to this court, and being number 201, October term 1923, which case is on appeal from a writ of error to the Supreme Court of the State of Mississippi.

This cause, Number 201, just referred to, is an action at law by the State Revenue Agent of Mississippi against the Southeastern Express Company, originally brought in the Circuit Court of Lauderdale County, Mississippi, to recover a privilege tax and penalty. Before this state case was finally determined, and when it became apparent that privilege taxes for another year would be demanded by the State Revenue Agent, the Southeastern Express Company filed its bill, in this pending cause in the District Court of the United States for the Southern District of Mississippi, seeking to enjoin the collecton of an identical privilege tax, and thereby raised before the Three-Judge tribunal in the Federal Court the same questions which were involved in the state case, referred to above as number 201.

Under date of December 1, 1922, Circuit Judge, Nathan P. Bryan, District Judge, E. R. Holmes, and District Judge H. D. Clayton, denied the application of the Express Company for an interlocutory injunction, from which this direct appeal was taken.

While the decision of the learned Three-Judge court did not need the support of further authority, it is significant that only three days thereafter, on December 4, 1922, the Supreme Court of Mississippi in the State case referred to, number 201 in this Court, upheld the validity of the said privilege tax law. It is immaterial to a decision of the present appeal that in said cause Number 201, the validity vel non of the penalty is also involved.

THE LAW OF MISSISSIPPI WHICH SEEKS TO IMPOSE PRIVILEGE TAXES UPON EXPRESS COMPANIES IS NOT VOID FOR UNCERTAINTY.

The decision of the Supreme Court of Mississippi, which we have referred to, construing the identical state statute, is of paramount importance.

Robertson, State Revenue Agent, vs. Southeastern Express Co., 94 So. Rep. 210.

The force of this decision of the Mississippi Supreme Court is rendered especially potent, when we recall the binding force of the construction by a state court of a state statute.

In Osborne vs. State of Florida, 164 U. S. 650, 41 Law Ed. 586, Justice Peckham said:

> "The particular construction to be given to this state Statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own state. Leffingwell vs. Warren, 67 U. S. (2 Black,) 599; New York vs. Weaver, 100 U. S. 539, 541; Noble vs. Mitchell, 164 U. S. 367, 372, and cases there cited."

It is pertinent to note that in the Osborne case (supra) the question involved was whether the particular Florida license statute dealing with Express Companies was indefinite, and uncertain. The Court said further:

> "Here however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest

heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state."

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid. * * *"

"The second ground for holding the statute void is that it is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license is a question of the construction of the state statute which does not necessarily involve a Federal question, and the determination of the state court as to the proper construction and sufficiency of such a statute is conclusive upon us."

"The construction given by the Supreme Court of Minnesota to Minn. Rev. Laws 1905, Chap. 11, taxing non-resident express companies, as including in the gross receipts upon which the tax is based the earnings from interstate shipments, where the transportation while in the hands of the companies taxed was performed wholly within the state, is binding upon the Federal Supreme Court on writ of error to the state court. United States Exp. Co. vs. Minnesota, 223, U. S. 335, 32 Sup. Ct. Rep. 211."

The power of a state to tax property used for the purpose of interstate commerce and having a situs within

its limits is not confined to taxation of specific articles of property, but may be exercised in any fair and reasonable manner. No authority is needed to recall incidents of privilege taxes based on average number of cars of specific character, such as parlor cars or refrigerator cars, or on mileage basis of railroads within a state, and various other vehicles of interstate commerce.

"The so-called 'unit system' by which the property of a public service corporation within a state may be valued for purposes of taxation by taking the fraction of the entire property of the corporation which bears the same proportion to the total property that the length of line within the state bears to the entire length of line, or that the business done or the property employed within the state bears to the entire business or property, may be constitutionally applied to corporations engaged in interstate commerce. Pullman Pal. Car Company v. Pennsylvania, 141 U. S. 18, 35 Law Ed. 613. Union Refrigerator Transit Company v. Lynch, 177 U. S. 149, 44 Law Ed. 708."

"Even in the case of an express company doing business in several states the same system may be constitutionally employed and the taxation of the property of the express company within the state determined by the proportion which the capital employed in the state bears to the whole capital, or it is competent to fix the value of the franchise of such a corporation in a state in the proportion that the mileage operated in the state bears to the total mileage of the company."

Am. Express Company vs. Indiana 165 U. S. 255, 41 Law Ed. 707.

Adams Exp. Co. vs. Ohio Auditor 165 U. S. 194, 41 Law Ed. 683.

Adams Exp. Company vs. Kentucky 166 U. S. 185, 41 Law Ed. 965.

It is fundamental that:

"The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes has always been recognized in the decisions of the United States Supreme Court Shaffer vs. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. Ed.) 445."

"When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before the federal supreme court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. Green vs. Frazier 253 U. S. 233, 40 S. Ct. 499, 64 U. S. (L. ed.) 878."

"When the federal supreme court is called upon to test a state tax by the provisions of the federal constitution, its decision must depend, not on the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical application and effect of the tax as applied and enforced. Wagner vs. Covington, 251, U. S. 95, 40 S. Ct. 93, 64 U. S. (L. ed.) 157; Shaffer vs. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) 445."

The classification of railroads under Section 45, Chapter 104 Laws of Mississippi, 1920, is clear, certain

and reasonable. It is immaterial for what purpose the classification was made. It is, however, important that such classification was actually made. As stated by the Mississippi Supreme Court in the case of

New Orleans M. & C. Railroad Company vs. State, 110 Miss. 290, 70 So. Rep. 355.

> "The whole act and the chapter in which it appears in our Code shows a general scheme for imposing an excise or privilege tax on various occupations, businesses and professions within the confines of our state, to raise revenues in support of our state government, and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the State."

It must be of some moment that the particular privilege tax law in question is Section 21, Chapter 104, Laws of 1920, and the section dealing with the classification of railroads is Section 45 of the same chapter 104, and that both sections are embraced under the same chapter, number 156, entitled "Privilege Taxes," in Hemingway's Code—Supplement of 1921.

The act in question places a fixed privilege tax of $500.00 on "each express company, transporting freight or passengers from one point to another in this state." Even opposing counsel would not admit that this tax of $500.00 was uncertain. What then is so uncertain and indefinite in the Act as to render it void? It is admitted that the Express Companies transact their business over and upon the railroads operating in the State of Mississippi. Is the fact that certain of the railroads are classed as "first class" and others "second and third class" sufficient to render the Act void for uncertainty? Necessarily the actual mileage of railroads in the state,

and the actual mileage of railroads used by the appellant Express Company in conducting its business within the state are certain of determination.

The particular act would not be void for uncertainty if it had placed a tax of $6.00 per mile on **all** railroads over which the Express business was operating.

Irrespective of whether it might be considered excessive, with these admitted hypotheses, the uncertainty must necessarily arise from the fact that the Express Company is not taxed at a fixed rate per mile over all railroads upon which it operates its business, but from the fact that over some roads, classed as "second and third class" it is required to pay a lesser amount per mile.

It has already been shown that the state has power to make reasonable classifications for the purposes of taxation. When the particular classification of railroads has been made by the properly constituted authority, and admitted as shown by the record, we are unable to see how there can be any doubt as to the certainty of the classification made.

In the case of Wells Fargo & Company vs. State of Nevada, 248 U. S. 165, 63 Law Ed. 190, a tax of $300.00 per mile of line was upheld.

In Lusk vs. Botkin, 240 U. S. 236, 60 Law Ed. 621, an annual tax was placed on foreign railway companies, measured by that proportion of its capital stock which is devoted to its Kansas business.

In Osborne vs. Florida, (supra) 164 U. S. 650, the tax was graduated according to the population of various cities. In passing we might add that in this day of

great civic pride, what could be more uncertain or difficult to determine each year than the population of cities.

In Pullman Palace Car vs. Hayward, 141 U. S. 36, 35 Law Ed. 621: A tax was apportioned among the counties of a state according to mileage of the railroads in those counties.

In St. Louis & S. W. R. R. Co. vs. Arkansas, 235 U. S. 350: A tax of 1-20 of 1 per cent was fixed on the proportion of outstanding capital stock employed by railroads, telegraph and express companies.

We mention these cases to show some of the various classifications adopted for the purposes of taxation which have been upheld by this court. With the railroad mileage within the state fixed and definite, the classification into first, second and third class determined, where can there be any uncertainty? Certainly such a classification as complained of by opposing counsel herein, can not be as vague and uncertain as some of the other means of classification upheld by this Court, as shown by the cases cited.

There is only **one** definite authority whereby the classification of railroads can be made in Mississippi. That authority is the Railroad Commission of Mississippi. When the Railroad Commission has made the classification, it is then certain and fixed.

APPELLANT IS NOT DENIED DUE PROCESS OF LAW OR EQUAL PROTECTION OF THE LAW BY THE PRIVILEGE TAX STATUTE OF MISSISSIPPI.

Appellant contends that it is not afforded due process of law and that equal protection of the laws is denied it; because Express Companies are not afforded no-

tice and opportunity to be heard when the various railroads are classified, either as to the express business carried on over the various railroads, or as to other facts entering into the railroad classification.

The Mississippi privilege tax law under attack here makes no distinction between domestic or foreign express companies: it applies to all express companies alike. The business of express companies is a reasonable classification in itself. We might well adopt the language of opposing counsel, "that the express business is separate and distinct from the railroad business is recognized by the Legislature of Mississippi in that a separation of the two has been made for taxing purposes."

If the classification of railroads into first, second and third class by the Railroad Commission, upon which the Express Companies are required to pay this excise tax, is not unreasonable, and the tax based thereon not confiscatory, neither this appellant nor any other express company can question the methods, the machinery, nor mental processes by which the classification was made.

There is no claim in the brief of counsel for appellant that the tax is excessive or confiscatory. Boiled down, the chief objection to the tax is that the Express Company had no voice in the classification of the railroads upon which the tax is based.

It is well said in the case of Maercker vs. City of Milwaukee, 139 N. W. 199, 1914 B. Anno. cases 199:

> "The policy of classification subject to constitutional limitations, is within legislative discretion and can never become a judcial question except for the purpose of determining in any given situation whether legislative action passes the boundaries of

reason, and in so determining reasonable doubts are resolved in the negative.

"The very fact of delegation of legislative power to regulate carriers an implication that there is a considerable field for legislative discretion not subjuct to judicial review, and it is only when the just bounds of that field are clearly exceeded, that the courts will hold such legislation invalid."

In the case of Magnolia Bank vs. Board of Supervisors, 72 So. Rep. 697, the Mississippi Supreme Court announced the rule thus:

"Each state has the sovereign right to classify property for purposes of assessment and taxation, and so long as property of the same class bears the same rate, or, to state differently, so long as there is no discrimination between property of the same class, there is no violation of these provisions of our Federal Constitution. Michigan Central Railroad Company vs. Powers, 201 U. S. 300, 26 Sup. Ct. 459, 50 L. Ed. 764, and authorities there mentioned."

Opposing counsel cite the case of Hager vs. Reclamation District, 111 U. S. 701. This authority would seem to bear out the contentions of appellee rather than those of appellant. Listen, as we quote therefrom as follows:

"Undoubtedly, **where life and liberty are involved,** due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opopportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax,

the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable."

"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, **license taxes** (not dependent upon the extent of his business) and generally, specific cases on things or persons or occupations, in such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter."

In Cincinnati, N. O. and Texas Pacific R. R. Company vs. Commonwealth of Kentucky, 115 U. S. 321, 29 Law Ed. 414, Justice Matthews clearly states the position that:

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial; and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient." In judging what is "due process of law," said Mr. Justice Bradley, in Davidson vs. New Orleans, 96 U. S. 97, 107 (Bk. 24, L. ed. 616, 620), "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible

in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' "

It may be true in the classification of the railroads under Section 45, the railroads have the opportunity to be heard, and that after the classification has been made the privilege taxes against Express Companies are fixed on such classifications without a hearing. The Express Companies can make no objection to the methods of taxation adopted by the Legislature for the railroads.

The Federal Constitution does not control the state authorities in the methods used to arrive at a reasonable classification for the basis of privilege taxes. If for the purpose of taxing all railroads in the state one method of classification is used, and for other carriers or public utilities such as Express Companies, telephone and telegraph companies, other methods are used, and in each instance the particular tax is reasonable, no constitutional objection can be successfully raised. See the case of

Davidson vs. Board of Administrators 97 U. S. 108, 24 Law Ed. 616.

A syllabus of the holding in the case just referred to is quoted as follows:

"Neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters

in which the Federal Constitution controls the state authorities."

Apellant's complaint is briefly that there is a "lack of machinery" in the methods used to classify Express Companies for the purpose of fixing the tax in question.

We may admit that there may be complete and probably complex machinery to classify railroads, Pullman cars and other public utilities for the purpose of taxation, but we deny that Express Companies have any reasonable ground for constitutional objection to their own classification, because the Legislature has seen fit to tax them on a basis of classification of railroads over which they operate their business.

Respectfully submitted,

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